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No. 83-1919

In The

Supreme Court of the United States

October Term, 1984

THE CITY OF OKLAHOMA CITY,

Petitioner,

vs.

ROSE MARIE TUTTLE,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

JOINT APPENDIX

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RELEVANT DOCKET ENTRIES

DATE	NR	PROCEEDINGS
5-22-81		COMPLAINT
6-17-81		ENTER Order plf is direct to resp w/supp brief & such docs as desired w/in 15 days to dft Julian Rotramel's mtn to dism (West) rw cc: attys
7-6-81		ANSWER of dfts The City of Okla. City & Julian Rotramel to plf's compl -ws
7-6-81		MOTION by dfts The City of Oklahoma City & Julian Rotramel to strike -ws
7-6-81		BRIEF of dfts in supp of mtn to strike -ws
7-8-81		ENTER Order plf is hereby direct to resp w/ supp brief & such docs as desired w/in 15 days fm the date hereof to dfts' mtn to strike; plf is also advised that if his resp to dft's mtn to dism is not rec'd w/in the next 5 days that said mtn will be grtd (West) rw cc: attys
7-10-81		BRIEF of plf in resp to dft's mtn to dism -ws
7-13-81		ENTER Order the Ct has considered the dft Julian Rotramel's mtn to dism & accompanying brief filed 6-16-81 & plf's brief in resp thereto; the pleadings in the case would reflect that the dft Julian Rotramel was served by alias summons on 6-26-81; therefore, the mtn to dism is denied (West) cc: attys
7-23-81		REPLY brief of plf to dfts' mtn to strike -ws
7-30-81		FIRST set of interrogs by dfts to plf -ws
8-12-81		ORDER plf's prayer for punitive damages is strkn agnst the dfts municipality & to that

DATE	NR	PROCEEDINGS
		extent the dfts' mtn to strike is grtd; the plf's prayer for punitive damages agnst the dft Rotermel individually is not strkn & therefore the dft's mtn to strike as it pertains to dft Rotermel individually is denied (West) cc: attys
8-28-81		SECOND set of interrogs by dfts to plf -ws
9-2-81		INTERROGATORIES by plf to dft Officer Julian Rotermel -ws
9-2-81		INTERROGATORIES by plf to dft City of Oklahoma City -ws
9-24-81		ANSWERS by plf to dfts' first set of interroga -ws
9-24-81		ANSWERS by plf to dfts' second set of interrogs -ws
9-30-81		MOTION by plf to strike & brief in supp -ws
10-2-81		ANSWERS by dfts to plf's interrogs -ws
10-2-81		ANSWERS by dfts to plf's interrogs -ws
10-5-81		ENTER Order dft is hereby direct to resp w/ supp brief & such docs as desired w/in 10 days fm the date hereof to plf's mtn to strike (West) rw cc: attys
10-6-81		THIRD set of interrogs of dfts to plf -ws
10-6-81		REPLY brief of dfts in resp to plf's mtn to strike -ws
10-20-81		MOTION by plf to compel proper verification of answers to interrogs w/BRIEF in supp -ws
10-20-81		MOTION by plf for production of docs by dft City of Okla. City -ws
10-20-81		INTERROGATORIES propounded by plf to dft Rotramel -ws
10-20-81		SECOND set of interrogs propounded by plf to dft City of Okla. City -ws

DATE	NR	PROCEEDINGS
10-27-81		AMENDMENT by plf to mtn for production of docs & mtn to compel proper verification of answers to interrogs -ws
10-29-81		ORDER the Ct finds that plf's mtn to strike the second affirmative defense asserted in the dfts' answer is denied (West) cc: attys
11-6-81		MOTION by plf for production of docs by dft City of Okla. City -ws JURY TRIAL DEMANDED
11-6-81		REQUEST by plf for admissions by dft City of Okla. City -ws
11-6-81		MOTION by plf for production of docs by dft City of Okla. City -ws
11-6-81		INTERROGATORIES by plf to dft Rotramel -ws
11-6-81		INTERROGATORIES by plf to dfts City of Okla. City & Officer Rotramel -ws
11-6-81		MOTION by plf for production of docs by dft City of Okla. City -ws
11-10-81		ANSWERS by dft Officer Julian Rotramel to interrogs of plf -ws
11-10-81		ANSWERS by dft City of Oklahoma City to interrogs of plf -ws
11-16-81		ENTER Order dft is direct to resp w/supp brief & such docs as desired w/in 10 days fm the date hereof to plf's mtns for production of docs (West) rw cc: attys
11-25-81		ORDER dfts are grtd 20 addl days fm 11-26-81 w/in which to resp to plf's mtns for production of docs (West) cc: attys
12-2-81		MOTION by plf for production of docs -ws
12-2-81		INTERROGATORIES propounded by plf to dft Rotramel -ws

DATE	NR	PROCEEDINGS
12-7-81		ANSWERS by plf to third set of interrogs propounded by dfts -ws
12-16-81		RESPONSE by dfts to mtn for production of docs -ws
12-16-81		RESPONSE by dfts to requests for admissions -ws
12-16-81		ENTRY of appearance of Richard E. Mahoney as atty of record for dfts
12-28-81		INTERROGATORIES to Deft Rotramel by Pltf -ws
1-4-82		ENTRY of appearance of Carl Hughes as addl cnsl of record for plf -ws
1-4-82		AMENDMENT to compl by plf w/LV GRTD TO FILE (West) -ws
1-4-82		STATUS/disc rpt of plf -ws
1-4-82		MOTION by plf for production of docs -ws
1-4-82		DISCOVERY/STATUS rpt of dfts -ws
1-7-82		ENTER Status Conf. Parties state contentions; suppl pretrial to be set Feb., 1982 parties to confer w/regard to production of docs; any further disputes to be brought to Ct's attention by way of renewed mtn to produce (West) rw
2-5-82		ENTER Pretrial. Parties state contentions; disc completion date 4-1-82; suppl pretrial to be set April, 1982; case to be on May jury dkt (West) rw
2-26-82		ANSWER by dft Julian Rotramel to interrogs of plf filed 11-6-81 w/LV TO FILE OUT OF TIME (West) cc: attys
2-26-82		ANSWER by dft Julian Rotramel to interrogs of plf filed 12-2-81 w/LV TO FILE OUT OF TIME (West) cc: attys

DATE	NR	PROCEEDINGS
2-26-82		ANSWER by dft Julian Rotramel to interrogs of plf filed 12-28-81 w/LV TO FILE OUT OF TIME (West) cc: attys
3-1-82		ANSWER of dft Okla. City to interrogs of plf filed 11-25-81 w/LV TO FILE OUT OF TIME (West) -ws
3-4-82		APPLICATION by plf for order compelling answer to interrog -ws
4-2-82		ENTER Pretrial. Parties state contentions; disc completion date ext to 5-1-82; case to be on May, 1982, jury dkt (West) rw
4-6-82		TRIAL Order (West) cc: attys
4-8-82		INTERROGATORIES by plf to dft City of Okla. City -ws
4-21-82		PRELIMINARY stmt by plf identifying the case -ws
4-26-82		STATEMENT by dfts identifying the case -ws
4-27-82		AMENDMENT to compl by plf w/LV GRTD TO FILE (West) -ws
4-27-82		MOTION by plf to compel disc & production of docs & to tax costs, or in the alternative, applica for sanctions & BRIEF in supp -ws
4-27-82		MOTION by plf to strike good faith defense -ws
4-27-82		BRIEF by plf in supp of mtn to strike good faith defense -ws
4-29-82		REQUEST by dfts for protective order -ws
4-29-82		BRIEF of dfts in supp of protective order -ws
4-28-82		ENTER Order dft is direct to resp w/supp brief & such docs as desired w/in 7 days fm this date to plf's mtn to strike good faith defense & mtn to compel disc & production of docs (West) rw cc: attys

DATE	NR	PROCEEDINGS
4-30-82		TRIAL brief of plf -ws
4-30-82		REQUESTED instructions by plf -ws
4-30-82		WITNESS list of plf -ws
4-30-82		EXHIBIT list of plf -ws
5-3-82		ENTER Order plf is direct to resp w/supp brief & such docs as desired w/in 5 days fm this date to dfts' mtn for protective order (West) rw cc: attys
5-5-82		OFFERED stipulations by plf & dfts
5-5-82		MOTION in limine by plf & BRIEF in supp -ws
5-5-82		MOTION in limine by plf & BRIEF in supp -ws
5-5-82		RESPONSE by plf to dft's mtn for protective order -ws
5-5-82		REQUESTED voir dire (to panel as a whole) by plf -ws
5-5-82		RESPONSE by dfts to plf's mtn to compel & production of docs -ws
5-5-82		RESPONSE by dfts to mtn to strike good faith defense -ws
5-6-82		SUPPLEMENTAL witness list of plf -ws
5-6-82		OBJECTION by dfts to witnesses of plf -ws
5-6-82		BRIEF of dft in supp of objection to plf's witnesses -ws
5-6-82		TRIAL brief of dft -ws
5-7-82		LIST of exhbs of dft -ws
5-7-82		REQUESTED jury instructions by dft -ws
5-7-82		OBJECTIONS of dfts to plf's list of exhbs -ws
5-13-82		ENTER Order plf Rose Marie Tuttle has moved the Ct to compel dft City of Okla. City to produce various docs & items & has further moved

DATE	NR	PROCEEDINGS
		the Ct to impose a variety of sanctions on the dft; the Ct finds plf's mtn to produce docs is moot except for the matter re the imposition, if any, of sanctions, upon which the Ct defers its ruling (West) cc: attys
5-13-82		ENTER Order the Ct finds that dft City of Okla. City's mtn for protective order requesting that disc not be had is denied (West) cc: attys
5-13-82		ENTER Order the Ct finds that plf's mtn to strike good faith defense is denied at this time (West) cc: attys
5-18-82		INTERROGATORIES by plf propounded to Fred B. Jordan, Medical Examiner -ws
5-18-82		SUPPLEMENTAL requested instructions by plf -ws
5-20-82		RESPONSE by dfts to plf's mtns in limine -ws
5-21-82		APPLICATION by plf for sanctions & BRIEF in supp -ws
5-21-82		MOTION by dft City of Okla. City to reconsider request for protective order & request for oral argument -ws
5-21-82		BRIEF of dft City of Okla. City in supp of mtn to reconsider request for a protective order -ws
5-24-82		RESPONSE by plf to dfts' mtn to reconsider request for protective order -ws
5-24-82		ENTER Order plf has moved the Ct to prohibit the introduction of any evid that the victim William Adam Tuttle had attempted suicide 7 mos. prior to being shot outside the We'll Do Club, etc.; the Ct finds plf's mtn in limine is denied w/o prej to plf renewing her objections to said evid at the time of trial (West) cc: attys

DATE	NR	PROCEEDINGS
5-24-82		ENTER Order plf has moved the Ct to prohibit the introduction of any evid that the victim William Adam Tuttle telephoned the police dept & reported an armed robbery was in progress at the We'll Do Club, etc.; the Ct finds that plf's mtn in limine is denied w/out prej to plf renewing her objections at time of trial (West) cc: attys
5-24-82		ENTER Order the Ct finds that dft's mtn to reconsider request for protective order is denied & that the records in the possession of the dft are to be made available for inspection by plf; the Ct finds that imposition of sanctions is not warranted & that plf's applica for sanctions is denied (West) cc: attys
5-26-82		ANSWER by Fred B. Jordan, Medical Examiner, to interrogs -n/s
5-12-82		ENTER Jury Trial. Jury duly empaneled & admonished; Ct adjourns to 9:00 a.m., 5-28-82 (West) rw
5-28-82		ENTER Further Jury Trial. Rule invoked on mtn of plf; plf & dft make opening stmts; plf presents case in chief w/test of witnesses; plf's exhbs 4A, 4B thru 4G, 6A thru 6C, 5A thru 5D, 35, 22, 6, 36, 3A, 3B admitted; Flarva Baer dism as juror & is replaced by Cecelia Frank, 1st alt.; Ct adjourns to 9:00 a.m., 6-1-82 (West) rw
6-1-82		ENTER Further Jury Trial. Plf continues case in chief w/test of witnesses; plf's exhbs 29, 13A, 13B, 4-H, 4-I, 17A, 17B, 19, 38, 8 admitted; dft's exhb 2 admitted; plf rests; dft's mtn for DV denied; dft presents case in chief w/test of witnesses; Ct adjourns to 9:00 a.m., 6-2-82 (West) rw
6-2-82		ENTER Further Jury Trial. Plf's exhbs 39, 1 admitted; dft's exhbs 3, 4 admitted; dft continues case in chief w/test of witnesses & rests; parties rest; plf & dft's mtn for DV denied; Ct adjourns to 10:00 a.m., 6-3-82 (West) rw

DATE	NR	PROCEEDINGS
6-3-82		ENTER Further Jury Trial. Closing arguments; Ct instructs jury; alternate discharged; jury retired to deliberate, returns w/verdict; Ct & cnsl feel verdict forms are inconsistent; Ct excuses jury until 9:00 a.m., 6-4-82 (West) rw
6-4-82		DEPOSITION test of Julian Rotramel -ws
6-4-82		DEPOSITION test of Officer Riley Lenex -ws
6-4-82		DEPOSITION test of Charles Edward Hill -ws
6-4-82		DEPOSITION test of Officer James Stanley Moss -ws
6-4-82		INSTRUCTIONS to the jury (West)
6-4-82		ENTER Further Jury Trial. Jury returns w/verdict for plf, is polled, is discharged; dft moves for judgm NOV—denied (West) rw
6-4-82		VERDICT Form No. 2 "We, the jury, find in favor of the dft Julian Rotramel & agns the plf, so that plf takes nothing by way of her claims agnst this dft" (Walter O. Kibbe, Foreman)
6-4-82		VERDICT Form No. 3 "We, the jury, find in favor of plf & agnst the dft City of Okla. City on the claim of violation of Civil Rights, 42 U.S.C. §1983 & find that actual or nominal damages proximately resulted fm the acts of said dft in the amt of $1,500,000.00" (Walter O. Kibbe, Foreman)
6-4-82		TWO BLANK verdict forms, Nos. 1 & 4
6-4-82		DEPOSITION of Charles Edward Hill, taken on behalf of plf, before Gail M. Taylor, CSR (Fees: $95.05 pd by plf)

DATE	NR	PROCEEDINGS
6-7-82		JUDGMENT that plf Rose Marie Tuttle take nothing by way of her claims agnst the dft Julian Rotramel & that said dft recover of plf his costs of this action; further that plf recover of the dft the City of Okla. City the sum of $1,500,000.00, w/int thereon at the rate provided by law, & her costs of the action (West) (COB #150) (Clerk) AND ENTERED -rw cc: attys
6-9-82		TRANSCRIPT of excerpt of proceedings of jury trial had 5-28-82, before Mary Garv Ct Rptr (Fees: $17.50 pd by plf)
6-14-82		MOTION by dft City of Okla. City fcr judgm NOV -ws
6-14-82		BRIEF OF dft City of Okla. City in supp of mtn for judgm NOV -ws
6-16-82		ENTER Order plf is direct to resp w/in 15 days to dft City of Okla. City's mtn for judgm NOV (West) cc: attys
6-17-82		DEPOSITION of Bertha Kay Conners, taken on behalf of dfts, before Ken Courtemanche CSR (Fees: $36.00 pd by dfts)
6-24-82		DEPOSITION of Beverly Jean Hayes, taken on behalf of dfts, before Ken Courtemanche CSR (Fees: $78.00 pd by dfts)
6-29-82		BRIEF OF plf in resp to dft's mtn for judgm NOV -ws
8-11-82		ORDER dft's mtn for judgm NOV is denied (West) cc: attys
8-18-82		APPLICATION by dft City of Okla. City for extens of time to comply w/the Ct's order of 8-2-82 -ws
8-20-82		MOTION by dft City of Okla. City to w/draw certain exhbs -ws

DATE	NR	PROCEEDINGS
8-24-82		RECEIPT by Richard F. Mahoney, cnsl for dft City of Okla. City, of said dft's exhbs 3a, 3b & 6, said exhbs have been w/drawn in compliance w/order of the Ct filed 8-23-82
9-10-82		NOTICE of appeal by dft City of Okla. City fm the judgm entered 6-7-82 & the order denying dft's mtn for judg NOV entered 8-11-82
9-10-82		RECEIVED $5.00 filing fee & $65.00 docketing fee. Receipt #19624
9-16-82		CLERK'S ltr re service of notice of appeal, w/copy ltr, notice of appeal & dkt sheet to cnsl & CCofA -mlc CCA #————
9-22-82		NOTICE of appeal by plf fm the judgm entered 6-7-82 -ws
9-22-82		CLERK's ltr re service of notice of appeal, w/copy ltr, notice of appeal & dkt sheet to cnsl & CCofA -mlc CCA #————
9-21-82		NOTICE of transcript order (ECD 1-30-83) cc: cnsl & CCofA -mlc

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

No. CIV-81-679-W

ROSE MARIE TUTTLE, Individually and as Administratrix of the Estate of William Adam Tuttle, Deceased,

Plaintiff,

vs.

CITY OF OKLAHOMA CITY, a Municipal Corporation; and OFFICER JULIAN ROTERMEL, Individually and as an Employee of the City of Oklahoma City, Through the Oklahoma City Police Department,

Defendants.

COMPLAINT

(Filed May 22, 1981)

The Plaintiff, Rose Marie Tuttle, acting Administratrix of the Estate of William Adam Tuttle, deceased, complaining of the Defendants and each of them, alleges and states:

I

This action filed for damages proximately caused by the deprivation by Defendants of rights protected by the Constitutions of the United States and the State of Oklahoma, Federal and State statutes, and the common law of the State of Oklahoma.

This is an action at law brought for the benefit of Plaintiff and next of kin of the deceased, William Adam Tuttle, to redress the deprivation under color of statute, ordinance, regulation, custom or usage, of rights, privileges or immunities secured to the Plaintiff by the Fourth, Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States, and also arising out of the law, statutes and Constitution of the State of Oklahoma, and more particularly set out hereinafter.

Jurisdiction

II

This action is brought pursuant to Title 42 of the United States Code, Sections 1983, 1985, 1986 and 1988; directly under the Fourth, Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States. Jurisdiction is founded upon Title 28 of the United States Code, Sections 1331, 1343, and 1391(b) and the Constitution of the United States, Fourteenth Amendment thereto, to redress the deprivation under color of statute, ordinance, regulation, custom or usage, of rights, privileges and immunities secured in the Constitution and the laws of the United States.

Plaintiff further invokes pendent jurisdiction of this Court to consider the claims arising under State law, this being an action wherein the State and Federal claims derive from a common nucleus of operational facts, and are such that the Plaintiff would normally be expected to try them all in a single judicial proceeding.

This action for damages is also authorized by laws of the State of Oklahoma, in particular 12 O.S. §1052 and 76 O.S. §6.

On the 24th day of November, 1980 the Plaintiff presented a timely claimed to the City of Oklahoma as provided in 51 O.S. §156, but said claim was neither paid nor was payment thereon refused, and has therefore been de-

nied by operation of law, and by operation of the Oklahoma Statutes 51 O.S. §157. Further, all conditions precedent have been fulfilled to the bringing of this action.

The amount in controversy, exclusive of interest and costs, exceeds the sum of $10,000.00.

Parties

III

Plaintiff Rose Marie Tuttle, individually and as acting Administratrix of the Estate of William Adam Tuttle, is a citizen of the United States and the State of Oklahoma.

During all times mentioned herein, the Defendant Officer Julian Rotermel was a resident of Oklahoma County, State of Oklahoma, and was duly employed by the City of Oklahoma City through the Oklahoma City Police Department, as a police officer of the City of Oklahoma City within Oklahoma County, State of Oklahoma.

Plaintiff alleges that at all times hereinafter mentioned, the Defendant Julian Rotermel was acting for and on behalf of the City of Oklahoma City, in his official capacity as a policeman.

That at all times hereinafter mentioned the Defendant City of Oklahoma City was and still is a municipal corporation, organized and existing under the by virtue of the laws of the State of Oklahoma, and may be served with summons by serving the Mayor Patience Latting.

That at all times hereinafter mentioned the Defendant City of Oklahoma City, by and through the Oklahoma City Police Department, hired and employed the Defendant Julian Rotermel to act as a police officer in the City of Oklahoma, and at all times condoned the acts and actions of the individual Defendant.

That at all times hereinafter mentioned the acts of the Defendant Julian Rotermel and the City of Oklahoma City were done under the color and pretense of the statutes, ordinances, regulations, customs and usages of the State of Oklahoma, and that the acts of the Defendant Rotermel were done as an agent, servant, and employee of the City of Oklahoma City, and the acts herein alleged were imputed to the Defendant City of Oklahoma City, who was acting pursuant to the orders and directives from the Defendant through the Oklahoma City Police Department.

Factual Allegations

IV

On or about the 4th day of October, 1980 at approximately 8:00 o'clock p.m. the Defendant Officer Julian Rotermel arrived to investigate a reported robbery at the We'll Do Club in Oklahoma City, Oklahoma County, State of Oklahoma.

There was no armed robbery at the We'll Do Club and although Defendant Rotermel found no evidence of an armed robbery, said Defendant wrongfully detained and seized William Adam Tuttle who was lawfully on the premises and at the time was committing no unlawful act.

Although the Defendants knew or should have known, based upon interrogation and investigation having previously taken place, that the decedent was not involved

in any armed robbery, that he was not committing any crime at the time, the Defendants without provocation or cause improperly detained the decedent by asking him to remain in the premises. When the decedent attempted to leave the club, Defendant Rotermel without warning and without further attempt to detain decedent, and without any provocation whatsoever, or without just or probable cause, fired a shot at the decedent, which struck him and ultimately caused his death.

Defendant never at any time advised decedent of any constitutional rights, but when decedent tried to exercise his rights, he was shot to death.

The City of Oklahoma City inadequately trained its police officer and hired inadequately trained personnel as Defendant police officer did not even know the constitutional rights of the decedent, or if he knew said constitutional rights of the decedent, intentionally deprived said decedent of such rights.

The City of Oklahoma City had actual knowledge or should have known of the propensity of said Defendant for violence and of his propensity of depriving citizens of the rights guaranteed by the Constitution of the United States based upon the systematic violations that have occurred through the Police Department of Oklahoma City in recent months past, and knew or by the exercise of reasonable care should have known that said Defendant was careless, unqualified and had a propensity for intentional deprivation of constitutional and civil rights of citizens. The City of Oklahoma City further failed to ascertain qualifications for their employees to enforce the laws in the City of Oklahoma City, State of Oklahoma, and in truth and fact chose to ignore any information of said

propensities, abuse and oppression chose to allow current policies to remain in full force and effect in violation of decedent's constitutional rights.

By reason of the unlawful and illegal shooting of the decedent by the Defendant, said decedent suffered severe pain and agony, mental and physical, and ultimately met his death.

The Defendants and each of them by their reckless, violent and malicious unlawful shooting of the decedent, under the color of state and local law, regulations, customs and usages, and under the authority of their respective official capacities, deprived said William Adam Tuttle of life, liberty, and property without due process of law in contravention of the rights secured to him under the Fourteenth Amendment of the United States Constitution, and has deprived said William Adam Tuttle, deceased, of his right to be free from cruel and unusual treatment guaranteed by the Constitution of the United States; and has deprived said William Adam Tuttle, deceased, of his rights, privileges and immunities secured to him by the First and Fourteenth Amendments to the United States Constitution; and has deprived said William Adam Tuttle, deceased, of equal protection of the law and the privileges and immunities granted him under the law in contravention of the Fourteenth Amendment of the United States Constitution; with reckless, wanton, negligent disregard of his rights, harmed, and ultimately killed said William Adam Tuttle in violation of the heretofore set forth laws; further, deprived said decedent of rights secured to him by the Fourth, Fifth, Sixth and Fourteenth Amendments of the Constitution of the United States in that decedent was subjected to an unlawful shooting and killing; and

deprived William Adam Tuttle, deceased, of rights secured to him by the Eighth and Fourteenth Amendments to the Constitution of the United States in that the use of excessive and unnecessary force resulting in the assault and battery, bodily injury and death, and mental, physical and emotional distress of the decedent, constituted the infliction of the cruel and unusual punishment upon him; and further, deprived the decedent of rights secured to him by the Sixth and Fourteenth Amendments to the Constitution of the United States in that excess force exercised at the hands of the Defendants, constituted an infliction of summary punishment which denied decedent of his rights to a fair and impartial trial prior to infliction of such punishment.

The assault and shooting of the decedent was a wilfull and malicious act upon the decedent and constituted an assault and battery and ultimately homicide upon his person.

The injuries to decedent resulted from the above-described wrongful acts of each of the Defendants. Such wrongful acts were of such a character that Plaintiff is entitled to maintain an action for such injuries. The wrongful acts and wilfull, malicious and wanton, constitute gross negligence, and evidence the conscious indifference to the clear risk involved of the rights of the decedent, and the citizens of the State of Oklahoma. Accordingly, the Plaintiff is entitled to recover exemplary and punitive damages, in additional to compensory damages. The injuries to the decedent were the direct and proximate result of the above-described wilfull, malicious and wrongful acts of the Defendants.

In the alternative the injuries to the Plaintiff were the direct and proximate result of the negligence, gross and wanton and wilfull negligence acts of the Defendants.

Plaintiff alleges that as a direct and proximate result of the negligence of the Defendants as aforesaid, and the death of William Adam Tuttle, and as a direct and proximate result thereof in the violation of his civil rights, Plaintiff became obligated to pay burial and funeral expenses in the amount of $2,134.65, and has further incurred hospital expenses in the amount of $500.00, and has incurred ambulance expenses in the amount of $200.00, for which Plaintiff claims damages against these Defendants.

Plaintiff alleges that at the time of the death of her husband, he was a normal healthy, able-bodied man of 35 years of age, of ordinary capacity and understanding of a man of that age and had a life expectancy of 37 years.

Plaintiff alleges that as a direct and proximate result of the acts aforesaid and the resulting death of her husband, as a surviving spouse and next of kin and heir at law, she has suffered pecuniary loss in the amount of $455,000.00, which Plaintiff claims damages against the Defendants.

Plaintiff alleges that following the passing of the bullet into the body of the decedent which ultimately caused his death, said decedent prior to this death, suffered severe, agonizing and excrutiating pain, both physical and mental, for which Plaintiff is entitled to recover damages on behalf of his estate in the amount of $2,000,000.00.

Plaintiff further alleges that as a result of harrassment, humiliation and embarrassment suffered by William

Adam Tuttle, prior to his death, he is entitled to monetary damages in the amount of $55,000.00.

Plaintiff further alleges that the acts of the Defendants were unwilfull, malicious and with callous and reckless indifference to and in disregard of the decedent's safety and continued life, and by reason of which Plaintiff's decedent is entitled to punitive damages in the amount of $1,500,000.00.

Prayer for Relief

IV

WHEREFORE, Plaintiff respectfully prays that this Honorable Court:

1. Assume jurisdiction over Plaintiff's causes of action.

2. Grant your Plaintiff the sum of $2,834.65 for actual expenses.

3. Grant your Plaintiff the sum of $455,000.00 for pecuniary losses.

4. Grant your Plaintiff the sum of $2,000,000.00 for pain and suffering of the decedent prior to his death.

5. Grant your Plaintiff the sum of $55,000.00 for harrassment, humiliation and embarrassment suffered prior to his death.

6. Grant your Plaintiff the sum of $1,500,000.00 for punitive damages.

7. And that this Honorable Court enter its order granting your Plaintiff monetary damages for the violation of the rights, privileges and immunities secured to

the Plaintiff under the laws of the Constitution of the United States in the amount of $2,512,834.65 and $1,500,000.00 punitive damages.

8. Grant such other and further relief which the Court may deem just and appropriate; and

9. Award your Plaintiff costs, expenses and attorney's fees where appropriate.

Respectfully submitted,

MISKOVSKY & GASSAWAY
Attorneys for Plaintiff

By /s/ MICHAEL GASSAWAY

JURY TRIAL DEMANDED

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

NO. CIV-81-679-W

ROSE MARIE TUTTLE, Individually and as Administratrix of the Estate of William Adam Tuttle, Deceased,

Plaintiff,

vs.

CITY OF OKLAHOMA CITY, a Municipal Corporation; and OFFICER JULIAN ROTERMEL, Individually and as an Employee of the City of Oklahoma City Police Department,

Defendants.

ANSWER

(Filed July 6, 1981)

COME NOW the Defendants, The City of Oklahoma City and Julian Rotramel, by and through their attorney of record, Grant E. Price, Assistant Municipal Counselor and for their answer to Plaintiff's Complaint do generally and specifically deny each and every material allegation and claim contained therein except what is specifically admitted, to-wit:

1. The jurisdiction of this Court and the basis thereof.

These Defendants would further assert, in the form of Affirmative Defenses, the following, to-wit:

1. That the Defendant Julian Rotramel, was at all times mentioned in Plaintiff's Complaint, duly qualified, appointed and an acting police officer of the City of Oklahoma City and a peace officer of the State of Oklahoma and that at all times herein mentioned said employee was engaged in the performance of his regularly assigned duties as a police officer.

2. That the Defendant employee at all times herein mentioned acted in good faith without malice and within the scope of his duties as a police officer of the City of Oklahoma City and peace officer of the State of Oklahoma.

3. That any injury to Plaintiff or William Adam Tuttle, Deceased, was due to and caused by the negligence and omissions of said Tuttle to care for himself, which carelessness and negligence and omissions were the proximate cause of the damage, if any to the Plaintiff and William Adam Tuttle.

4. That any injury or damage suffered by Plaintiff or Tuttle, was caused solely by reason of Tuttle's wrongful acts and conduct and the willfull resistance to a peace officer in the discharge, and attempt to discharge the duty of his office, and not by reason of any unlawful acts or omissions of the Defendant.

5. That the actions of the Defendant and its employee were lawful and proper and probable cause existed for the arrest of Tuttle.

6. That the action of the Defendant and its employee in all respect was reasonable, proper and legal.

7. A public employee is not liable for any injury arising out of his entry upon any property where such entry is expressly or impliedly authorized by law.

8. Tuttle knew or should have known that he was being arrested by a peace officer and had the duty of refrain from using force, threats of force, or any weapon to resist such arrest.

9. To the extent that Plaintiff and Tuttle suffered any detriment, such detriment was caused or contributed to by Tuttle's negligence.

10. Plaintiff and Tuttle did not suffer any detriment or damages in any amount whatsoever.

11. Tuttle failed to take reasonable action to avoid or to mitigate the alleged detriment or damages.

12. If Plaintiff or said Tuttie suffered any detriment, such was not proximately caused by Defendant.

13. To the extent that the Defendant used any force during the incident complained of, he did so to resist the commission of a public offense.

WHEREFORE, having fully and completely answered the Plaintiff's Complaint, the Defendants demand strict proof of all allegations and claims contained in said Complaint and for a trial by jury of same, and further pray that Plaintiff take nothing and that the defendants go free of all costs herein.

WALTER M. POWELL
MUNICIPAL COUNSELOR

By: /s/ GRANT E. PRICE
Assistant Municipal Counselor
309 Municipal Building
200 North Walker
Oklahoma City, Oklahoma 73102
(405) 231-3819

Attorneys for Defendants

CERTIFICATE OF MAILING

This is to certify that on this 6 day of July, 1981, a true and correct copy of the above and foregoing Answer was mailed to Michael Gassaway, 200 N. Harvey, 802 Park Harvey Bldg., Oklahoma City, Oklahoma, Attorney for Plaintiff.

/s/ GRANT E. PRICE

IN THE DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA
SINGLE INCIDENT OR OCCURRENCE

If you should find that the violation of a person's constitutional rights did occur, but that violation occurred only on an isolated occasion, a single incident is not sufficient to prove inadequate training and procedure was provided and you must find for the defendant.

McClelland v. Facteau, 610 F.2d 693, 10th Cir., (1979)

IN THE DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA
AFFIRMATIVE LINK

If the plaintiff has failed to show an "affirmative link" between instances of police misconduct and the adoption of an policy or plan by the defendant City of Oklahoma City, you must find for the defendant.

Rizzo v. Goode, 423 U.S. 362, 96 S.Ct. 598, (1976)

INSTRUCTIONS TO THE JURY BY THE COURT
(From Transcript of Proceedings of June 3, 1982)

THE COURT: Be seated, please, ladies and gentlemen of the jury. You will recall that there are two remaining portions of this trial, the closing arguments of counsel and the court's instructions with regard to the law. Now, ordinarily in Federal Court, we argue the case by the attorneys first and then the court gives you all of its instructions with regard to the law. The state court procedure is the opposite. The court instructs first and then the attorneys argue, and we have decided and agreed in this case—the attorneys have agreed—to a large extent we will follow the state procedure. In other words, the court will instruct you with regard to the law prior to the time the attorneys make the closing argument in the hopes and

in the expectation that that might be more meaningful to you in understanding their argument after having heard the court's instructions. So I wanted you to know that we are reversing the normal procedure and hope that it is of benefit to you. Therefore, ladies and gentlemen of the jury, I will now proceed to give you all of the closing phase of the court's instructions after which you'll hear the closing arguments of counsel.

Now that you have heard all of the evidence and the argument of counsel, it becomes my duty to give you the instructions of the court concerning the law applicable to this case.

That's not entirely correct until you have had an opportunity to hear the argument, but it is now my duty to give you the instructions of the court concerning the law applicable to this case.

It is your duty as jurors to follow the law as I shall state it to you, and to apply that law to the facts as you find them from the evidence in the case. You are not to single out one instruction alone as stating the law, but must consider the instructions as a whole. Neither are you to be concerned with the wisdom of any rule of law stated by me.

This action arises from the events of October 4, 1980, when William Adam Tuttle, the husband of the plaintiff, Rose Marie Tuttle, was shot by Officer Julian Rotramel of the Oklahoma City Police Department in the parking lot of the Will Do Club located at Northwest Tenth and Portland. Rotramel was responding to a police broadcast reporting an armed robbery in progress at the club. Rotramel entered the club and motioned to the bartender,

Vonnie Hinds, to approach. Whereupon, Rotramel questioned Ms. Hinds about the reported armed robbery. Tuttle, who had been inside the club, approached Rotramel as he was standing by the west door and attempted to walk past Rotramel out the door. Rotramel detained Tuttle and continued his inquiry regarding the armed robbery with the bartender, who informed Rotramel that there was no armed robbery occurring. Shortly after Rotramel asked Tuttle to remain inside, Tuttle darted through the door and Rotramel discharged his weapon once striking Tuttle in the lower back.

The plaintiff brought this action in her individual capacity as the administratrix of the Estate of William Adam Tuttle, deceased, against Rotramel and the City of Oklahoma City. The plaintiff has asserted that the decedent was deprived of his constitutional and civil rights in violation of the Federal Civil Rights Act, 42 USC Section 1983. The plaintiff has alleged that Defendant Rotramel under color of state law acted unreasonably reckless and that the reckless actions violated the constitutional and civil rights of the decedent. The plaintiff has further asserted that the City of Oklahoma City should be held responsible because the city acting pursuant to a policy or plan failed to properly train and supervise Defendant Rotramel and other officers, and because the inadequate training and supervision resulting in deliberate indifference to the decedent's rights proximately caused the decedent's death. The plaintiff has also brought a state claim against the defendants for assault and battery.

The plaintiff has sought on behalf of the estate and herself the following damages from the defendants, jointly and separately: $2,134.65 for burial expenses, $984.60

for hospital and medical expenses, $55,000 for loss of consortium and grief as the surviving spouse, $2,000,000 for mental anguish and physical pain suffered by the decedent prior to his death, $455,000 for pecuniary loss, namely loss of future earnings of the decedent, and $250,000 for grief and loss of companionship of the children. The plaintiff has also sought $1,500,000 in punitive damages from the defendant, Rotramel.

The defendants have denied all the allegations of the plaintiff. The Defendant Rotramel has contended that he believed that the decedent was the armed robbery suspect and that the unreasonable and unexpected behavior of Tuttle caused the officer to discharge his weapon and that he acted in good faith in the performance of his duties as a member of the Oklahoma City Police Department. The city has contended that Rotramel was properly trained and supervised and that the death of the plaintiff's decedent did not result from any improper training or supervision of from any official municipal policy or practices.

Now, the foregoing recitation as to the claims of the plaintiff herein and the defenses of the defendants herein are given to you simply to define the issues to be tried between the parties and such statements do not constitute proof of any fact in issue in this case.

Now, there are certain stipulations of the parties. The plaintiff and the defendants have agreed:

1. That on November 24, 1980, the City Clerk of the City of Oklahoma City was given notice of the claim against the city and the Oklahoma City Police Department

and Julian Rotramel pursuant to the Political Subdivision Tort Claims Act;

2. That said notice was timely; and

3. That on October 4, 1980, although an armed robbery in progress was called into the Oklahoma City Police Department, there was in truth and in fact no armed robbery committed at the Will Do Club at Northwest Tenth and Portland on said date.

You are instructed that the parties have agreed to the facts contained in these stipulations and that these stipulations are to be received by you and considered by you as evidence in this case without the need of any testimony thereon.

All right. You're to consider each defendant separately. As the plaintiff has sued two defendants herein and claims that each is liable to her in damages, the jury is instructed that it must consider the evidence and the instructions herein as to each of the defendants to ascertain if the plaintiff has proved her case against each such defendant. The fact that one defendant may be found liable to the plaintiff should not govern another defendant unless the jury finds, under the evidence herein and these instructions, that such other defendant is also liable to the plaintiff. That is to say. that the jury should consider the liability of each defendant to the plaintiff under the evidence and the court's instructions as to the law of the case.

In addition to having separate claims against each defendant, the plaintiff has also asserted several theories of recovery; that is, the plaintiff has asserted claims un-

der the Civil Rights Act against each defendant and has asserted claims of assault and battery against each defendant.

In this regard you are instructed that should you find in favor of the plaintiff on one or more theories of recovery against the defendant, the plaintiff would be entitled to only one recovery of her damages which proximately resulted from the acts or omissions of that defendant.

Regardless of any opinion you may have as to what the law is or ought to be, it would be a violation of your sworn duty to base a verdict upon any view of the law other than that given in the instructions of the court, just as it would also be a violation of your sworn duty, as judges of the facts, to base a verdict upon anything other than the evidence in the case.

In deciding the facts of this case you must not be swayed by bias or prejudice or favor as to any party. Our system of law does not permit jurors to be governed by prejudice or sympathy or public opinion. Both the parties and the public expect that you will carefully and impartially consider all of the evidence in the case, follow the law as stated by the court, and reach a just verdict regardless of the consequences.

This case should be considered and decided by you as an action between persons of equal standing in the community and holding the same or similar stations in life. The City of Oklahoma City is a municipal corporation duly and legally chartered by the state of Oklahoma and is entitled to the same fair trial at your hands as is a private individual. The law is no respecter of persons, and all persons, including corporations stand equal before the law and are to be dealt with as equals in a court of justice.

As stated earlier, it is your duty to determine the facts, and in so doing you must consider only the evidence I have admitted in the case. The term "evidence" includes the sworn testimony of the witnesses and the exhibits admitted into the record.

Remember that any statements, objections or arguments made by the lawyers are not evidence in the case. The function of the lawyers is to point out those things that are most significant or most helpful to their side of the case, and in so doing, to call your attention to certain facts or inferences that might otherwise escape your notice. In the final analysis, however, it is your own recollection and interpretation of the evidence that controls in this case. What the lawyers say is not binding upon you.

So, while you should consider only the evidence in the case, you are permitted to draw such reasonable inferences from the testimony and exhibits as you feel are justified in the light of common experience. In other words, you may make deductions and reach conclusions which reason and common sense lead you to draw from the facts which have been established by the testimony and evidence in this case.

Now, it is the duty of attorneys on each side of a case to object when the other side offers testimony or other evidence which counsel believes is not properly admissible.

When the court has sustained an objection to a question, the jurors are to disregard the question, and may draw no inference from the wording of it or speculate as to what the witness would have said if permitted to answer.

Upon allowing testimony or other evidence to be introduced over the objection of counsel, the court does not indicate any opinion as to the weight or effect of such evidence. As stated before, the jurors are the sole judges of the credibility of all witnesses and the weight and the effect of all evidence. The jury is instructed not to draw any inference for or against either side of the case by any ruling or comment made by the court during the trial.

Now, I have said that you must consider all of the evidence, but this does not mean, however, that you must accept all of the evidence as true or accurate.

You are the sole judges of the credibility or "believability" of each witness and the weight to be given to his or her testimony. In weighing the testimony of a witness, of course, you should consider his or her relationship to the plaintiff or the defendants; his or her interest, if any in the outcome of the case; his or her manner of testifying; his or her opportunity to observe or acquire knowledge concerning the facts about which he or she testified; his or her candor, fairness, and intelligence; and the extent to which he or she has been supported or contradicted by other credible evidence. You may, in short, accept or reject the testimony of any witness in whole or in part.

Now, the testimony of a police officer is entitled to no special or exclusive sanctity. A police officer who takes the witness stand subjects his testimony to the same examination and the same tests that any other witness does, and in the case of police officers you should not believe them merely because they are police officers. You should recall their demeanor on the stand, their manner

of testifying, the substance of their testimony, and weigh and balance it just as carefully as you would the testimony of any other witness. People employed by the government, including police officers, do not stand in any higher station in the community than other persons, and their testimony is not entitled to any greater weight.

Also, the weight of the evidence is not necessarily determined by the number of witnesses testifying as to the existence or nonexistence of any fact. You may find that the testimony of a smaller number of witnesses as to any fact is more credible than the testimony of a larger number of witnesses to the contrary.

A witness may be discredited or "impeached" by contradictory evidence, by a showing that he or she testified falsely concerning a material matter, or by evidence that at some other time the witness has said or done something, or has failed to say or do something, which is inconsistent with the witness' present testimony.

If you believe that any witness has been so impeached, then it is your exclusive province to give the testimony of that witness such credibility or weight, if any, as you may think it deserves.

The rules of evidence provide that if scientific, technical, or other specialized knowledge might assist the jury in understanding the evidence or in determining a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify and state his opinion concerning such matters.

You should consider each expert opinion received in evidence in this case and give it such weight as you may

think it deserves. If you should decide that the opinion of an expert witness is not based upon sufficient education and experience, or if you should conclude that the reasons given in support of the opinion are not sound, or that the opinion is outweighed by other evidence, then you may disregard the opinion entirely.

Now, the burden is on the plaintiff to prove every essential element of her claims by a "preponderance of the evidence." A preponderance of the evidence means such evidence as, when considered and compared with that opposed to it, has more convincing force and produces in your minds a belief that what is sought to be proved is more likely true than not true. In other words, to establish a claim by a preponderance of the evidence merely means to prove that the claim is more likely so than not so.

In determining whether any fact in issue has been proved by a preponderance of the evidence, the jury may consider the testimony of all the witnesses, regardless of who may have called them, and all of the exhibits received in evidence, regardless of who may have produced them. If the proof should fail to establish any essential elements of the plaintiff's claim by a preponderance of the evidence, the jury should find for the defendants as to that claim.

Likewise, Defendant Rotramel has the burden to prove by a preponderance of the evidence his defense of good faith as hereinafter explained in these instructions.

You are instructed that evidence may be either direct or circumstantial. Direct evidence is evidence such as the testimony of an eye-witness, or other testimony based upon actual personal knowledge or observation of the facts in controversy. Circumstantial evidence is evidence of

certain facts from which a jury may deduce the facts sought to be proved, that is, a jury may infer other connecting facts which usually and reasonably follow.

Direct proof of intent—a state of mind—is often not possible and is not necessary for the same may be and usually is proved by circumstantial evidence. If you find that a given act was done by the defendants, the intent with which they acted is to be determined by you from all the facts and circumstances as shown by the evidence in this case.

It is not necessary to find that the defendants had any specific intent to deprive the decedent of his civil rights in order to find in favor of the plaintiff. The plaintiff is entitled to relief if the defendants intended the actions which resulted in a violation of the decedent's rights.

During the course of the trial certain testimony has been shown to you by way of deposition. You are instructed that you are not to discount this testimony for the sole reason that it comes to you in the form of a deposition. It is entitled to the same consideration, and the same judgment on your part with reference to its weight, as is the testimony of witnesses who have taken the stand.

Now, the Civil Rights Act. The plaintiff has asserted a claim under the Civil Rights Act, 42 USC Section 1983. The two defendants have different liabilities under this act and different defenses are available to them. Accordingly, this instruction must be read in connection with the instructions I will give you as to the liabilities of the Defendant Rotramel and the defendant, the City of Oklahoma City.

In this case the plaintiff claims damages alleged to have been sustained by the decedent as the result of a deprivation under color of state law of a right secured to the decedent by the Constitution of the United States and by an Act of Congress providing for equal rights of all persons within the jurisdiction of the United States.

Specifically, the plaintiff alleges that the defendants while acting under color of authority of the State of Oklahoma subjected the decedent to the deprivation of rights and privileges secured by the Constitution and Laws of the United States; that is, Defendant Rotramel by his acts deprived the decedent of his right to liberty and life without due process by subjecting him to excessive force in effecting the decedent's apprehension, and the defendant, the City of Oklahoma City, due to the inadequate training of Defendant Rotramel which amounted to gross negligence and deliberate indifference to the rights of the decedent likewise deprived the decedent of his right to liberty and life without due process.

You are instructed as a matter of law that under the Constitution of the United States, every citizen is constitutionally protected against the unlawful or unreasonable taking of his life or liberty and against being subjected to excessive force in his apprehension.

You are further instructed that Title 42, Section 1983 of the U.S. Code provides that any citizen, or his legal representative if deceased, may seek redress in this court by way of damages against any person or persons, who, under color of state law or custom, subjects such citizen to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States.

In order to prove her claim, the burden is upon the plaintiff to establish by a preponderance of the evidence each of the following elements:

1. That the defendants performed acts which operated to deprive the decedent of his federal constitutional rights previously mentioned;

2. That the defendants then and there acted under color of the authority of the State of Oklahoma; and

3. That the defendants' acts were the proximate or legal cause of the damages sustained by the decedent.

Acts are done "under color" of the authority of a state not only when state officials act within the bounds or limits of their lawful authority, but also when such officers act without and beyond the bounds of their lawful authority. In order for unlawful acts of an official to be done "under color of authority," however, the unlawful act must be done while the official is purporting or pretending to act in the performance of his official duty; that is to say, the unlawful act must consist in an abuse or misuse of power which is possessed by the official only because he is an official; and the unlawful act must be of such a nature, and be committed under such circumstances that it would not have occurred except for the fact that the person committing the act was an official purporting to exercise his official powers.

The first aspect of the plaintiff's claim is that the decedent was deprived of his right to liberty and life "without due process of law." To be deprived of one's life and liberty "without due process of law" means to be deprived of such right without the authority of the law. Before the jury can determine whether the decedent was de-

prived by the defendants of his rights "without due process of law," the jury must first determine from a preponderance of the evidence in the case whether the defendants committed the acts alleged, and, if so, whether the defendants acted under the circumstances within or without the bounds of their lawful authority under state law. If the defendants acted within the limits of their lawful authority under state law, then the defendants could not have deprived the plaintiff of any right "without due process of law."

The plaintiff has also claimed that the decedent was subjected to excessive force in his apprehension. In that regard as previously mentioned, you are instructed that every person has the right not to be subjected to unreasonable or excessive force while being apprehended by a law enforcement officer. On the other hand, an officer has the right to use such force as is necessary under the circumstances. Whether the force used was unnecessary, unreasonable or violent is an issue to be determined in the light of all the surrounding circumstances on the basis of that degree of force a reasonable and prudent officer would have applied.

You are instructed that under the rules and regulations of the Oklahoma City Police Department the use of firearms by a police officer is not justified when used:

1. To fire a warning shot;

2. To apprehend a misdemeanor suspect or person committing a misdemeanor;

3. To fire at moving or fleeing vehicles when only misdemeanor or traffic offenses have been committed; or

4. The use of deadly force constitutes a greater threat to innocent human lives than allowing the criminal to escape.

You are further instructed that under the rules and regulations of the Oklahoma City Police Department the use of firearms by a police officer is not justified except as permitted under the justifications as follows:

1. The police officer is justified in using his firearm only in the defense of life in the instances where the suspect is armed and/or making an attempt to kill or do great bodily harm; and

2. When necessary, defined as being essentially as a last resort, committed in retaking felons who have escaped or when necessarily committed in arresting felons fleeing justice.

You are also instructed that under the Oklahoma City Police Department rules and regulations that the use of a firearm by an officer is not justified if an apprehension and/or arrest can reasonably be made without violence. Furthermore the rules and regulations provide that under all circumstances being in mind the value of human life, an officer will exercise the utmost discretion in the use of his weapon.

You are instructed that the law does not permit the use of deadly force by police officers solely because a citizen is found committing a misdemeanor.

You are also instructed that in promulgating a police department manual, the City of Oklahoma City was estab-

lishing official policies and guidelines for the officers to follow.

In determining whether an officer had reasonable grounds to believe that a person has committed an offense, the facts known to him need not meet the standard of conclusiveness upon which a conviction must be based; but rather, the actions of the officer in making an arrest are to be measured by the test of what a reasonable person would have believed under the same circumstances.

In summary, if you find from a preponderance of the evidence in the case after applying these instructions that the plaintiff has proved her claim that the decedent was deprived of his rights to liberty and life without due process of law and was subjected to unreasonable force in his apprehension, then your verdict will be for the plaintiff and against the defendants. On the other hand, if you find that the plaintiff has not proved her claims of constitutional deprivation or that the Defendant Rotramel has proved by a preponderance of the evidence his affirmative defense of good faith as hereinafter explained to you, then your verdict will be for the defendant or defendants and against the plaintiffs.

In order to prevail upon her civil rights claim against the individual defendant, Rotramel, the burden of proof is upon the plaintiff to establish the following elements by a preponderance of the evidence:

1. That the defendant in question acting under color of state law knowingly deprived the decedent of his constitutional right not to be deprived of life or liberty without due process of law or his right not to be subjected to unreasonable force in the manner claimed herein by the plaintiff; and

2. That the acts of the defendant in question were the proximate cause of the injury to the decedent.

In connection with the first element, you are instructed that a police officer of the City of Oklahoma City, Oklahoma, would be acting under color of state law when in the performance of his official duties. If the defendant purported or pretended to act in the performance of his official duty as a police officer, he was acting under color of law. It is the nature of the act performed, not the clothing of the actor or even the status of being on duty which determines whether the officer has acted under color law.

With reference to the second element of these claims as set forth above you are directed to Instruction No. so and so in which I will define and explain proximate cause. I haven't yet numbered those, and I'll come back to that, ladies and gentlemen of the jury, at a later date.

Good Faith Defense of Police Officers

You are instructed that the individual defendant, Rotramel, as a police officer, has raised the affirmative defense of qualified "good faith" immunity to protect him against the claims of the plaintiff that the officer deprived the decedent of his constitutional rights. The defendant has the burden of proving this affirmative defense.

If you find from the evidence that Defendant Rotramel acted with a good faith belief that his actions were within his lawful authority and that reasonable grounds existed for this belief based upon the circumstances existing at the time of his action; and if you further find that this defendant did not know, nor reasonably should have

known, that his actions would violate the constitutional or statutory rights of the decedent; and finally, if you find that this defendant did not act with malicious intent to deprive the decedent of his constitutional rights or other rights, or cause other injury to the decedent, then in the event of these findings, your verdict should be for the defendant Rotramel on the plaintiff's civil rights claim.

Liability of the City of Oklahoma City

If you have found that the plaintiff's decedent was denied any of his civil rights as explained in these instructions, then you should consider whether the City of Oklahoma City is liable for the denial of the civil right in question.

The standards for assessing liability of the city are different from the standards assessing the liability of the individual defendant.

If a police officer denies a person his constitutional rights, the city that employs that officer is not liable for such a denial of the right simply because of the employment relationship. Thus, in this particular case, you are instructed that the City of Oklahoma City is not liable for the deprivation of the decedent's constitutional rights solely because it hired and employed the Defendant Rotramel. But there are circumstances under which a city is liable for a deprivation of a constitutional right. Where the official policy of the city causes an employee of the city to deprive a person of such rights in the execution of that policy, the city may be liable.

This occurs when a city implicitly or tacitly authorizes, sanctions, ratifies, or acquiesces in the constitutional

deprivation in such a manner that such constitutional deprivation can be found to result from the execution of a city's official policy or custom.

In the circumstances of the case before you, the City of Oklahoma City can be found to have authorized, sanctioned, or acquiesced in any denial of the decedent's rights only if an official policy which results in constitutional deprivations can be inferred from acts or omissions of supervisory city officials and if that policy was a proximate cause of the denial of the civil rights of the decedent.

It is the plaintiff's contention that such a policy existed and she relies upon allegations that the city is grossly negligent in training of police officers, in its failure to supervise police officers, and in its failure to review and discipline its officers. The plaintiff has alleged that the failure of the city to adequately supervise, train, review, and discipline the police officers constitutes deliberate indifference to the constitutional rights of the decedent and acquiescence in the probability of serious police misconduct. Furthermore, the policy of placing police officers on duty who were inexperienced and unqualified to act in a particular situation in applying the use of a deadly weapon constitutes deliberate indifference to the rights of the decedent.

The city, of course, has denied the plaintiff's allegations and further denies the existence of an official policy of the City of Oklahoma City which results in constitutional deprivations.

The existence of such a policy is a question of fact for you to determine. The policy, if it existed, need not be expressed in writing; it may be an implicit policy. An offi-

cial policy can be inferred from the acts of a municipality's supervisory officials, as well as from its omissions, if the inaction amounts to deliberate indifference or to tacit approval of an offensive act.

Absent more evidence of supervisory indifference, such as acquiescence, such an acquiescence—I'm sorry, let me read that over. I'm getting a little thick tongued here. Absent more evidence of supervisory indifference, such as acquiescence in a prior matter of conduct, official policy such as to impose liability on the City of Oklahoma City under the federal Civil Rights Act cannot ordinarily be inferred from a single incident of illegality such as a first excessive use of force to stop a suspect; but a single, unusually excessive use of force may be sufficiently out of the ordinary to warrant an inference that it was attributable to inadequate training or supervision amounting to "deliberate indifference" or "gross negligence" on the part of the officials in charge. The city cannot be held liable for simple negligence. Furthermore, the plaintiff must show a causal link between the police misconduct and the adoption of a policy or plan by the defendant municipality.

You are instructed that in order for the City of Oklahoma City to be liable for an act violating the constitutional rights of another under 42 USC 1983, more than a negligent act or failure to act must be shown. The plaintiff must show that the conduct of the municipality was grossly negligent, reckless, or of deliberate indifference and if the plaintiff cannot show such conduct, you are instructed to find in favor of the defendant City of Oklahoma City on the civil rights charge.

A city may not, under the civil law—let me read that again—the city may not under the law assert an affirmative defense of good faith. Accordingly, if the plaintiff proves by a preponderance of the evidence that the City of Oklahoma City knowingly violated the decedent's civil rights under this instruction then you should find for the plaintiff and against the City of Oklahoma City without considering any affirmative defense of good faith. I want to stress that a good faith defense is available, under the Civil Rights Act, is available to the individual defendant. It is not available to the City of Oklahoma City. On the other hand the act requiring, or finding the defendant, individually, Rotramel, individually liable are different from those finding the city liable under that same act.

Gross negligence as used in this instruction demands evidence of near recklessness or shockingly unjustified and unreasonable action while negligence requires only a showing of unreasonableness.

Under the Civil Rights Act a person subjects another to the deprivation of a constitutional right if that person does an affirmative act, participates in another's affirmative acts, or omits to perform an act which he is legally required to do that results in the constitutional deprivation complained of.

Furthermore, personal participation is not the only requirement for liability. Anyone who "causes" any citizen to be subjected to a constitutional deprivation is also liable. The required causal connection can be established not only by some kind of direct personal participation in the deprivation but also by setting in motion a series of acts by others which the actors know or reasonably should

know would result in the constitutional injury being inflicted upon others.

This does not mean that the law recognizes only one proximate cause for an injury or deprivation. On the contrary, many factors or things or the conduct of two or more persons may operate at the same time, either independently or together to cause injury or deprivation. In such a case, each may be a proximate cause.

Now, malice defined: The word maliciously, as used herein, does not mean hatred, spite, or ill will as commonly understood. The word as used in these instructions means a wrongful act intentionally done without just cause or excuse and not by accident or mistake. Malice can be inferred if you find that the defendant's act with reckless disregard of lawful rights of the decedent were heedless of the necessary results of the act of which the plaintiff now complains, or acted without regard to the propriety or the consequences of their acts.

An act or omission is "knowingly" done if done voluntarily and intentionally and not because of mistake or accident or other innocent reason.

You are instructed that suicide is not a defense to either the civil rights claims or the assault and battery claim asserted by the plaintiff. It was admitted and is to be considered by you as bearing only on mitigation of damages and/or as bearing only on whether the officer was justified in determining that his own life was in danger.

Assault and Battery

You are instructed that any intentional attempt or threat to inflict injury upon the person of another, when

coupled with an apparent present ability to do so, and an intentional display of force such as would give the victim reason to fear or expect immediate bodily harm, constitutes an "assault." An assault may be committed without actually touching, striking or doing bodily harm to the person of another.

Any intentional use of force upon the person of another is a "battery." So, the least intentional touching of the person of another, if accompanied by an intentional use or display of force such as would give the decedent reason to fear or expect immediate bodily harm constitutes a "battery."

You are instructed that the plaintiff has asserted a claim of assault and battery against the defendant Rotramel and has contended that the acts of said defendant proximately resulted in the decedent's injuries and death.

You are instructed that the defense of good faith as explained to you in the previous instruction asserted by the defendant Rotramel is applicable to the charge of assault and battery and should be considered by you in this regard.

Should you find for the plaintiff on her claim of assault and battery against the defendant Rotramel, then you are instructed that the defendant, the City of Oklahoma City would also be liable on this claim because at the time of the alleged assault and battery, defendant Rotramel was acting within the scope of his employment as a police officer.

Damages

Damages must be reasonable. If you should find that the plaintiff is entitled to a verdict, you may award

her only such damages as will reasonably and fairly compensate for such injury and damages as you find from a preponderance of the evidence in the case that were sustained as a proximate result of the incident.

If you have found that the decedent's civil rights have been violated, this fact in itself entitles plaintiff to actual damages, even if only nominal damages. Therefore, if you decide that the plaintiff, if you decide for the plaintiff on the issue of liability, you must then fix the amount of money damages which will reasonably and fairly compensate for any harm which was proximately caused by the wrongful conduct of the defendants.

If you find no actual damages have been proved, you may award nominal damages of $1.00. Among the elements of injury and harm which you should consider are:

1. The violation of the constitutional rights of the decedent;

2. The loss of future earnings of the decedent;

3. The physical pain suffered by the decedent prior to his death;

4. The emotional and mental anguish suffered by the decedent prior to his death;

5. Reasonable medical expenses incurred by the decedent prior to his death;

6. The reasonable expense for the burial of the decedent;

7. The loss of consortium and the grief suffered by the surviving spouse, the plaintiff herein;

8. The grief and loss of companionship of the children of the decedent; and

9. Any punitive damages you decide that the plaintiff is entitled to. The elements of these damages and their method of calculation will be explained to you more fully in these instructions.

Damages—Present Worth of Future Loss

If you should find that the plaintiff is entitled to a verdict and further find that the evidence in the case establishes the loss of future earnings, then it becomes your duty to ascertain the present worth in dollars of such future damages, since the award of future damages necessarily requires the payment be made now for a loss that will not actually be sustained until some future date.

Under these circumstances, the result is that the estate will in effect be reimbursed in advance of the loss, and so will have the use of money which it would not have received until some future date, but for the verdict.

In order to make a reasonable adjustment for the present use, interest free, of money representing a lump sum payment of anticipated future loss, the law requires that the jury discount, or reduce to its present worth, the amount of the anticipated future loss, by taking (1) the interest rate or return which the estate would reasonably be expected to receive on an investment of the lump sum payment, together with the period of time over which the future loss is reasonably certain to be sustained; and then, reduce it or in effect deduct from the total amount of anticipated future loss whatever that amount would be reasonably certain to earn or return, if invested at such rate of interest over such future period of time; and include in the verdict an amount for only the present worth—that is the reduced amount—of the total anticipated future loss.

Now, inflation and taxes: In considering any element of damage to be experienced in the future you are instructed that you should not take into account any possible effect of present or future inflation one way or another.

Under the law, any award made to the plaintiff in this case is not subject to federal or state income tax. Therefore, in computing the amount of damages which you may find the plaintiff is entitled to recover for the loss of future earnings, the plaintiff is entitled to recover only the net, after tax income. In other words, the plaintiff is entitled to recover only "take-home pay" which you find the estate will lose in the future.

Elements of Damage for Assault and Battery

If you find in favor of the plaintiff on the claim of assault and battery, you are instructed that you must fix the amount of money damages which will reasonably and fairly compensate the decedent for any harm which proximately resulted from the wrongful conduct. Among the elements you should consider are:

1. Any pain, suffering, and mental anguish suffered by the decedent and proximately resulting from the injury in question;

2. The reasonable value of medical expenses incurred, including hospital accommodations and care and the services of nurses, attendants, and ambulance service;

3. Such sum as will reasonably compensate for any loss of future earnings. In determining this last amount you should consider what the decedent's health, physical ability, and earning power were before the incident in question.

Wrongful Death Damages

Elements for the estate: 1. Lost accumulations: the estate's loss of net accumulations which is that part of the decedent's net income from salary after taxes, including pension benefits not excluding income from investments continuing beyond death, which the decedent, after paying his personal expenses and monies for the support of his survivors, would have left as part of his estate if he had lived his normal life expectancy are recoverable. The decedent's normal life expectancy was 37 years. In determining this amount you should consider what the decedent's health, physical ability, and earning power were before the incident in question.

Elements for survivors: 1. Lost support and services: the survivor's loss, by reason of the decedent's injury and death, of the decedent's support and services are recoverable. In determining the duration of any future loss, you should consider the joint life expectancy of the survivor and the decedent and the period of minority of any healthy minor children.

In evaluating future loss of support and services, you shall consider the survivor's relationship to the decedent, the amount of the decedent's probable net income available for distribution to the survivor and the replacement value of the decedent's services to the survivor. Support includes contributions in kind as well as sums of money. Service means tasks regularly performed by the decedent for a survivor that will be a necessary expense to the survivor because of the decedent's death.

2. Medical and funeral expenses paid by the survivor: Medical or funeral expenses due to the decedent's

death paid by any survivor are recoverable including the reasonable cost of hospital accommodations and care, the reasonable cost of nurses and doctors, and the reasonable cost of ambulance service. Additional element for the surviving spouse and minor children:

1. Damages of surviving spouse:

The wife's loss of the decedent's companionship and protection, and her mental pain and suffering as a result of the decedent's death are recoverable. In determining the duration of such losses, you shall consider the joint life expectancy of the decedent and the surviving spouse.

2. Damages of the surviving minor children:

The loss by the decedent's minor children of parental companionship, instruction, and guidance and their mental pain and suffering as a result of the decedent's death are recoverable. In determining the duration of such losses, you shall consider the joint life expectancy of the decedent and each of the surviving children.

You are also instructed that the plaintiff may recover for any pain, suffering, and mental anguish suffered by the decedent prior to his death which proximately resulted from the incident.

Now, damages—punitive and exemplary: In addition to actual damages, the law permits the jury, under certain circumstances to award the injured person punitive and exemplary damages, in order to punish the wrongdoer for some extraordinary misconduct and to serve as an example or warning to others not to engage in such conduct.

You are instructed that as a matter of law no one may recover punitive damages against a municipality. Accordingly, punitive damages may in no instance be awarded against the City of Oklahoma City.

If the jury should find from a preponderance of the evidence in the case that the plaintiff is entitled to a verdict for actual or nominal damages, and should further find that the act or omission of the defendant Rotramel which proximately caused actual injury or damage to the decedent was wantonly done, then the jury may, if in the exercise of discretion they unanimously choose to do so, add to the award of actual damages such amount as the jury shall agree to be proper as punitive and exemplary damages.

An act of a failure to act is "wantonly" done if done in reckless or callous disregard of or indifference to the rights of one or more persons, including the injured person.

Whether to make an award of punitive and exemplary damages in addition to actual damages is a matter exclusively within the province of the jury, should the jury unanimously find, from a preponderance of the evidence in the case, that defendant Rotramel's act or omission which proximately caused actual damage to the decedent was wantonly done; but the jury should always bear in mind that such extraordinary damages may be allowed only if the jury should first unanimously award the plaintiff a verdict for actual or nominal damages; and the jury should also bear in mind, not only the conditions under which, and the purposes for which, the law permits an award of punitive and exemplary damages to be made, but also the requirement of the law that the amount of such extraordinary damages, when awarded, must be fixed with calm discretion and sound reason, and must never be either awarded or fixed in amount because of any sympathy, bias, or prejudice with respect to any party in the case.

There is no exact rule by which to determine the amount of punitive damages. The amount you fix as punitive damages need bear no particular ratio or relationship to the amount you award as compensatory damages. The amount you fix as punitive damages is the amount as in the exercise of your sound judgment and discretion you find will serve to punish the wrongdoer and deter others.

Now, the fact that I have instructed you on the proper measure of damages should not be considered as an indication of any view of mine as to which party is entitled to your verdict in this case. Instructions as to the measure of damages are given only for your guidance, in the event that you should find in favor of plaintiff on the question of liability, by a preponderance of evidence and in accord with the other instructions.

All right. Now, ladies and gentlemen of the jury, I have remaining two simple closing instructions to give to you with regard to your duty to deliberate and how you go about electing a foreman and reporting to the court. I will defer those until the close of argument of counsel, which I will remind you will now take place.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

CIV-81-679-W

ROSE MARIE TUTTLE, Individually and as Administratrix of the Estate of William Adam Tuttle, Deceased,

Plaintiff,

vs.

CITY OF OKLAHOMA CITY, a Municipal Corporation; and OFFICER JULIAN ROTRAMEL, Individually and as an Employee of the City of Oklahoma City through the Oklahoma City Police Department,

Defendants.

JUDGMENT

(Filed June 7, 1982)

This action came on for trial before the Court and a jury, the Honorable Lee R. West District Judge, presiding, and the issues having been duly tried and the jury having duly rendered its verdict,

IT IS ORDERED AND ADJUDGED that the plaintiff, Rose Marie Tuttle, Individually and as Administratrix of the Estate of William Adam Tuttle, Deceased, take nothing by way of her claims against the defendant, Julian Rotramel, and that said defendant recover of the plaintiff his costs of the action.

IT IS FURTHER ORDERED AND ADJUDGED that the plaintiff, Rose Marie Tuttle, Individually and as Administratrix of the Estate of William Adam Tuttle, Deceased, recover of the defendant the City of Oklahoma City, the sum of One Million Five Hundred Thousand Dollars ($1,500,000.00), with interest thereon at the rate provided by law, and her costs of the action.

DATED at Oklahoma City, Oklahoma, this 7th day of June, 1982.

/s/ Lee R. West
United States District Judge

Entered in Judgment Docket on June 7.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

CIV-81-679-W

ROSE MARIE TUTTLE, Individually and as Administratrix of the Estate of William Adam Tuttle, Deceased,

Plaintiff,

vs.

CITY OF OKLAHOMA CITY, a Municipal Corporation; and OFFICER JULIAN ROTRAMEL, Individually and as an Employee of The City of Oklahoma City Police Department,

Defendants.

ORDER

(Filed August 11, 1982)

On June 7, 1982, the Court entered judgment pursuant to a verdict rendered by the jury in favor of the plaintiff, Rose Marie Tuttle, Individually and as Administratrix of the Estate of William Adam Tuttle, Deceased, and against the defendant, the City of Oklahoma City, in the amount of $1,500,000.00. The jury also found in favor of the defendant, Julian Rotramel, and against the plaintiff.

Subsequent to accepting the jury's verdict, the municipal defendant moved in open court for judgment notwithstanding the verdict pursuant to Rule 50(b), F.R. Civ.P., and for remittitur of damages. The Court denied the motions but directed the parties to file written post-trial motions so that the Court could more properly examine and consider the merits of such motions.

The case now comes before the Court upon written motion by the municipality for judgment notwithstanding

the verdict. The plaintiff has responded by brief in opposition to the motion and has argued that the oral motion made after the verdict was read precludes reurging of the same now; that the municipality is precluded from asserting in its instant motion any grounds which it did not raise in its Motions for Directed Verdict made at the close of the plaintiff's case-in-chief and again at the close of all the evidence; and that the Tenth Circuit decision, *McClelland v. Facteau,* 610 F.2d 693 (10th Cir. 1979), upon which the defendant has relied, does not require the Court to grant the instant motion.

The Court, upon consideration of the submissions and the argument and authority contained therein, finds that while the instant motion is not barred by the Court's previous ruling from the bench denying the municipality's oral motion for judgment notwithstanding the verdict, said motion should be denied for the following reasons.

The defendant has argued that the plaintiff in litigating her claim under 42 U.S.C. § 1983 against the defendant municipality failed to prove that the incident of October 4, 1980, which resulted in the death of the plaintiff's husband was anything more than a single, isolated occurrence or that the defendant municipality had any indication that the training or supervision of its police officers was insufficient prior to October 4, 1980.

In *McClelland,* the Tenth Circuit on a motion for summary judgment regarding the duties and liabilities of police supervisors in a section 1983 action considered the duty of training and establishing departmental procedures separately from the duty of supervising to correct misconduct of which the police supervisors have notice and

stated with regard to the former that "[s]howing that individual officers violated a person's constitutional rights on an isolated occasion is not sufficient to raise an issue of fact whether adequate training and procedures were provided." 610 F.2d at 697. The circuit court however stated further that "[o]nly by countering with evidence that the training or procedures were defective could [the plaintiff] have raised an issue of fact whether this duty was breached." *Id.*

In *McClelland,* the defendants brought forward affidavits and documents showing adequate training and department policies while the plaintiff countered with no evidence to the contrary. In the instant case, the Court finds that the plaintiff brought forward sufficient evidence regarding inadequate training and procedures to warrant submission to the jury of the issue of the municipality's liability for breach of this duty. The issue of notice raised by the defendant goes to a separate duty, namely the duty of supervision to correct misconduct of which a supervisor has notice, and thus, a separate basis for liability.

The standards in the Tenth Circuit for considering a motion for judgment notwithstanding the verdict are set forth in *Barnett v. Life Insurance Co. of the Southwest,* 562 F.2d 15, 17 (10th Cir. 1977), wherein the appellate court stated:

> "The trial court on this motion for judgment n.o.v. by the defendant should have examined the evidence in a light most favorable to the plaintiff, together with the reasonable inferences to be drawn from the facts. The standard to be used by the trial courts is essentially the same as applied for directed verdicts. *See Oldenburg v. Clark,* 489 F.2d 839 (10th Cir.); *Taylor v. National Trailer Convoy, Inc.,* 433 F.2d 569 (10th Cir.); Rule 50(b), Fed.R.Civ.P., and the general common law practice. In *Taylor v. National Trailer Convoy, Inc.,* we held that judgment n.o.v. is proper where '. . . the evidence and all the inferences to be drawn therefrom are so patent that minds of reasonable men could not differ as to the conclusions to be drawn therefrom.' We said in *Symons v. Mueller Co.,* 493 F.2d 972 (10th Cir.):
>
> > '. . . A scintilla of evidence is insufficient, of course, to justify submission of a case to the jury. Nevertheless, a directed verdict or judgment n.o.v. may not be granted unless the evidence points but one way and is susceptible to no reasonable inferences which may sustain the position of the party against whom the motion is made. *Swearngin v. Sears Roebuck & Co.,* 376 F.2d 637, 639 (10th Cir. 1967).'
>
> And in *C. H. Codding & Sons v. Armour & Co.,* 404 F.2d 1 (10th Cir.):
>
> > 'The rule for the granting of a directed verdict has been often repeated. Its essence requires that before a motion for a directed verdict shall be sustained the evidence must be "all one way or so overwhelmingly preponderant in favor of the movant that the trial court in the exercise of its sound discretion would be required to set the verdict aside." *Chicago, Rock Island & Pacific R.R. v. Howell,* 401 F.2d 752. . . .' "

The Court finds upon the foregoing authority that after examining the evidence in a light most favorable to the plaintiff, together with the reasonable inferences drawn therefrom, that reasonable minds could differ as to the conclusions to be drawn from such evidence and thus, that the evidence warranted submission of the issue of the municipality's liability due to inadequate training to the jury.

Accordingly, the defendant's Motion for Judgment Notwithstanding the Verdict is DENIED.

IT IS SO ORDERED this 11th day of August, 1982.

/s/ LEE R. WEST
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

CIV-81-679-W

ROSE MARIE TUTTLE, Individually and as Administratrix of the Estate of William Adam Tuttle, Deceased,

Plaintiff,

vs.

CITY OF OKLAHOMA CITY, a Municipal Corporation; and OFFICER JULIAN ROTRAMEL, Individually and as an Employee of The City of Oklahoma City Police Department,

Defendants.

NOTICE OF APPEAL

(Filed September 10, 1982)

Notice is hereby given that The City of Oklahoma City, defendant above named, hereby appeals to the United States Court of Appeals for the Tenth Circuit from the judgment entered by this Court June 7, 1982, and the order denying defendant's motion for judgment not withstanding the verdict entered in this action August 11, 1982.

Respectfully submitted,

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The City of Oklahoma City

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

Nos. 82-2164 & 82-2175

ROSE MARIE TUTTLE, Individually and as Administratrix of the Estate of William Adam Tuttle, Deceased,

Plaintiff-Appellee
and Cross-Appellant,

vs.

CITY OF OKLAHOMA CITY, a Municipal Corporation; and OFFICER JULIAN ROTRAMEL, Individually and as an Employee of the CITY OF OKLAHOMA CITY through the OKLAHOMA CITY POLICE DEPARTMENT,

Defendants-Appellants
and Cross-Appellees.

Appeal from the United States District Court
for the Western District of Oklahoma

(D. C. No. CIV-81-679-W)
(Filed February 28, 1984)

Carl Hughes, Huges, Nelson & Gassaway, Oklahoma City, Oklahoma (Michael Gassaway, Hughes, Nelson & Gassaway, Oklahoma City, Oklahoma, with him on the brief), for Plaintiff-Appellee and Cross-Appellant Rose Marie Tuttle

Burck Bailey, Fellers, Snider, Blankenship, Bailey & Tippens, Oklahoma City, Oklahoma (Warren F. Bickford IV and Margaret McMorrow-Love, Fellers, Snider, Blankenship, Bailey & Tippens, Oklahoma City, Oklahoma, with him on the brief), for Defendant-Appellant, Cross-Appellee City of Oklahoma City

Robert E. Manchester, McClelland, Collins, Bailey, Bailey & Manchester, Oklahoma City, Oklahoma (Susan Talbot, McClelland, Collins, Bailey, Bailey & Manchester, Oklahoma City, Oklahoma, with him on the brief), for Defendant-Appellant, Cross-Appellee Officer Julian Rotramel

Michael C. Turpen, Attorney General of Oklahoma; David W. Lee, Assistant Attorney General, Chief, Federal Division, Oklahoma City, Oklahoma, for Amicus Curiae State of Oklahoma

Diane Pedicord, Oklahoma City, Oklahoma, for Amicus Curiae Oklahoma Municipal League

Before BARRETT, DOYLE and SEYMOUR, Circuit Judges

DOYLE, Circuit Judge

This matter is before us pursuant to 28 U.S.C. § 1291, the regular appeals statute, and 42 U.S.C. § 1983, dealing with the violation of constitutional and statutory rights.

Rose Marie Tuttle was the plaintiff in the court below. She brought this action against the defendants, Oklahoma City and Police Officer Julian Rotramel, individually and as administratrix of the estate of her deceased husband. She alleged deprivation of her husband's statutory and constitutional rights to life and liberty, contrary to 42 U.S.C. § 1983.

The cause was tried to a jury in the United States District Court for the Western District of Oklahoma. A verdict was returned in favor of Mrs. Tuttle in the amount of $1,500,000 actual damages against the City. The jury returned a verdict in favor of the defendant Rotramel, the officer who caused the damage by shooting and killing Tuttle. The jury found in favor of Officer Rotramel because the jury found that he acted in good faith. Oklahoma City has appealed the verdict against it and Mrs. Tuttle appeals the verdict and order to pay costs for Rotramel, the police officer.

This incident took place on October 4, 1980. The decedent William Tuttle was inside, and had been inside, the We'll Do Club in Oklahoma City. A complaint was made reporting an armed robbery in progress at the We'll Do Club. The party who called the police described the alleged robber as a 37 year old male with brown hair and glasses. The description matched Mr. Tuttle, and the parties stipulated that Mr. Tuttle actually made the call. Police Officer Julian Rotramel was dispatched to the Club, and when he arrived there was no armed robbery in progress. The bartender testified that she informed Rotramel that no robbery had occurred. Decedent attempted to leave the Club, and Officer Rotramel told him to stay where he was. Decedent disregarded Rotramel and left. Tuttle did not at any time brandish a weapon. In fact, Tuttle made no overt threat. Nevertheless, Officer Rotramel drew his gun and shot the decedent in the back. The latter was a short distance from the officer and had gone down on one knee. No weapon was found on the decedent; there was allegedly a toy gun which was said to have been found in Tuttle's possession. This was not visible to the officer, but he said

that he was apprehensive that the decedent had a weapon. Decedent died from the gunshot wound very soon after the incident.

A limited number of contentions have been asserted in support of the requested reversal. These are set forth and also discussed below.

1. *The contention that the trial court erred as a result of not directing a verdict against Rotramel on the issue of liability.*

Mrs. Tuttle argues that the facts of the case fail to support Rotramel's claim of good faith, and hence the trial court should not have allowed the issue to go to the jury. We here address this issue.

The good faith defense of police officers charged with constitutional violations was first recognized by the Supreme Court in *Pierson v. Ray*, 386 U.S. 554 (1967). In its most recent pronouncement on the good faith defense, the Supreme Court made clear that an officer's good faith must be judged by an objective standard. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982) (government officials "are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known"). *Harlow* reaffirmed the objective standard previously applied, but overruled earlier Supreme Court pronouncements that a subjective component existed as well. *See Wood v. Strickland*, 420 U.S. 308, 322 (1975) ("A school board member is not immune from liability for damages under § 1983 if he knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the consti-

tutional rights . . . of the student"); *Scheuer v. Rhodes*, 416 U.S. 232, 247-48 ("It is the existence of reasonable grounds for the belief formed at the time and in light of all the circumstances, coupled with the good faith belief, that affords a basis for qualified immunity"); *Pierson v. Ray*, 386 U.S. at 557 ("If the jury found that the officer reasonably believed in good faith that the arrest was constitutional, then a verdict for the officers would follow, even though the arrest was, in fact, unconstitutional").

An officer's good faith is not an absolute defense to charges; it is an affirmative defense that must be pleaded and proved by the defendant officer. *See Gomez v. Toledo*, 446 U.S. 635; *Martin v. Duffie*, 463 F.2d 464, 468 (10th Cir. 1972).

Under certain circumstances, the facts may negate the good faith defense as a matter of law. If the facts construed in the light most favorable to the defendant officer utterly belie his belief or the reasonableness of it, his defense should not be considered by the jury. *Butler v. Goldblatt Bros., Inc.*, 589 F.2d 323, 326 (7th Cir. 1978). Jury instructions on an affirmative defense should only be given if reasonably supported by the evidence.

Defendant Rotramel admitted at trial that he violated Police Department policy in shooting Mr. Tuttle. He testified however, that he believed Mr. Tuttle was a felon reaching for a gun. His belief was supported by some evidence. Officer Rotramel was responding to a report that a robbery had taken place. Apparently, Mr. Tuttle made the report, describing himself and reporting that the robber had a gun. Officer Rotramel testified that he attempted to stop Mr. Tuttle, that a struggle had ensued

and that Mr. Tuttle repeatedly reached for his boot. Officer Rotramel claimed that Mr. Tuttle broke away and was again reaching for his boot, apparently retrieving a weapon, when Officer Rotramel shot him. The other witnesses to the shooting disputed these aspects of Rotramel's testimony. If the jury believed Officer Rotramel, however, it could find that he reasonably believed his response was permitted.

The trial court clearly thought the evidence was sufficient to send the issue to the jury, and the jury apparently believed Officer Rotramel's story. Inasmuch as the jury was properly instructed and since there is evidence which favors Rotramel, we cannot assume that the conclusion was improper. It is not enough that Officer Rotramel's good faith defense does not seem to be strongly supported in this case; we must decline to rule that it was inadequate as a matter of law. There was some evidence that he reasonably believed that his life was threatened and his actions were justified. Accordingly, we affirm the jury's finding that Officer Rotramel acted in good faith and thus deny the contention of Mrs. Tuttle.

2. *The contention of the City that the evidence was insufficient to justify submission to the jury.*

The City insists that the trial court erred in denying the defendant City's motions for a directed verdict and judgment notwithstanding the verdict. Its claim is that the trial judge held the City to a standard of ordinary negligence in failing to train Officer Rotramel, rather than the allegedly required showing of gross negligence or deliberate indifference. The argument is also that a single incident of police misconduct cannot establish

grossly negligent training, and that, in light of the single incident here, the trial court should have granted the City's motion for a directed verdict and for judgment notwithstanding the verdict.

The plaintiff-appellee Mrs. Tuttle argues that extensive evidence, and not the single incident referred to, established the grossly negligent training provided by the City. She argues that virtually all of the evidence established the necessary link between the *inadequate* training and the constitutional deprivation. *Owen v. Haas,* 601 F.2d 1242 (2d Cir. 1979). She claims that the trial judge recognized that gross negligence existed if the City had actual or imputed knowledge of the almost inevitable consequences that arise from completely inadequate training or supervision. See *Leite v. City of Providence,* 463 F.Supp. 585, 590-91 (D.R.I. 1978). We agree that Judge West properly denied the City's motions and properly submitted the issue to the jury.

3. *Appellant's further contentions that the Judge's instructions to the jury were erroneous and that the judgment should be set aside because of these alleged error or errors.*

The argument of the City, taken as a whole, is that the jury instructions did not articulate the law governing the case. Particularly, the City challenges the instruction to the jury that it could find for the plaintiff based upon a single incident of the use of force, from which the jury could infer inadequate training. The plaintiff-appellee, Mrs. Tuttle, contends that the sufficiency of the instructions is not usually to be determined by error in any single instruction, but rather by viewing the charge as a whole. *United States v. Jenkins,* 701 F.2d 850 (10th Cir.

1983). We regard the challenged instruction to be proper, and we consider that the instructions, taken as a whole, properly state the law of municipal liability and affirmative defenses. Apart from the killing incident, there was adequate evidence. Even the officer admitted the inadequacy of the training.

There was much complaint on the part of the City to the effect that the standard of wrong-doing submitted by the court was that of ordinary negligence. However, the instructions given do not agree with this. The instruction which addresses the applicable standard of gross negligence and other elements of the claim is as follows:

> You are instructed that the City of Oklahoma City is not liable for the deprivation of the decedent's constitutional rights solely because it hired and employed the defendant Rotramel. But there are circumstances under which a city is liable for a deprivation of a constitutional right. Where the official policy of the city causes an employee of the city to deprive a person of such rights in the execution of that policy, the city may be liable.
>
> This occurs when a city implicitly or tacitly authorizes, sanctions, ratifies, or acquiesces in the constitutional deprivation in such a manner that such constitutional deprivation can be found to result from the execution of a city's official policy or custom.
>
> In the circumstances of the case before you, the City of Oklahoma City can be found to have authorized, sanctioned, or acquiesced in any denial of the decedent's rights only if an official policy which results in constitutional deprivations can be inferred from acts or omissions of supervisory city officials and if that policy was a proximate cause of the denial of the civil rights of the decedent.
>
> It is the plaintiff's contention that such a policy existed and she relies upon allegations that the City

> is *grossly negligent* in training of police officers, in its failure to supervise police officers, and in its failure to review and discipline its officers. The plaintiff has alleged that the failure of the city to adequately supervise, train, review, and discipline the police officers constitutes *deliberate indifference* to the constitutional rights of the decedent and acquiescence in the probability of serious police misconduct. Furthermore, the policy of placing police officers on duty who were inexperienced and unqualified to act in a particular situation in applying the use of a deadly weapon constitutes deliberate indifference to the rights of the decedent.
>
> The City, of course, has denied the plaintiff's allegations and further denies the existence of an official policy of the City of Oklahoma City which results in constitutional deprivations.
>
> The existence of such a policy is a question of fact for you to determine. The policy, if it existed, need not be expressed in writing; it may be an implicit policy. An official policy can be inferred from the acts of a municipality's supervisory officials, as well as from its omissions, if the inaction amounts to deliberate indifference or to tacit approval of an offensive act. (Emphasis supplied.)

Contrary to the present contention of appellant, the trial judge, in outlining the standard, required proof of the City's *gross negligence*. The jury was told that inadequate training of Rotramel amounting to gross negligence and deliberate indifference to the rights of the decedent was necessary in order to deprive the decedent of his right to liberty and life without due process. In other words, the gross negligence standard was plainly set forth as it pertains to the civil rights claim under § 1983.

The instructions were not erroneous. The gross negligence-indifference standard was sufficient as instructed.

As a result the court was correct in denying dismissal relief to the City.

4. *The appellant City's argument that the alleged liability of the City is based only on training and supervision arising out of a single incident.*

The city cites case law in support of the doctrine that a single incident is not adequate evidence to establish liability for inadequate training and supervision. *McClelland v. Facteau,* 610 F.2d 693, 696 (10th Cir. 1979). There it is noted that a police chief could be held liable if he neglected his duty to train subordinates and establish department procedures. He must provide protection for constitutional rights and supervision to correct misconduct of which he has notice. The showing that the individual police officer may have violated the law on an isolated occasion was said not to be sufficient to raise an issue of fact for purposes of imposing liability on police chiefs for failure to train subordinates and establish department procedures that would provide protection for constitutional rights. The court added that there was a genuine issue of material fact as to whether defendant police chiefs violated the duty of supervision to correct misconduct of which they had notice.

Although *McClelland* case is entirely different from the case at bar, involving as it does police chiefs failing to supervise, the principle is much more difficult to establish than the violation here. The act here was so plainly and grossly negligent that it spoke out very positively on the issue of lack of training, the problem which is presented. We are not to be understood as holding that there exists a guarantee that all persons whose constitutional rights are violated by municipal employees will recover

from the City. Our holding requires proof of a city's violation of its duty such as to constitute deliberate indifference to the rights of its citizens. Here there was plenty of independent proof of lack of actual training. In this case the individual defendant had been on the police force for a very short period of time; moreover, he admitted his lack of training to cope with robberies. Nevertheless, he was allowed to go in on a suspected robbery by himself. Also, his gross failure to successfully handle the problem clearly demonstrated his complete lack of training and also his lack of ability. Thus, the incident itself, as well as independent evidence, attested to the officer's lack of knowledge and ability. He claims to have considered Tuttle to be a robber but instead of pursuing him for the purpose of questioning, he fatally shot him without the least justifiable provocation. The single incident rule is not to be considered as an absolute where the circumstances plainly show a complete lack of training.

Our conclusion must be that this action, coupled with the clearly inadequate training, demonstrate the City's gross negligence and deliberate indifference to the rights of the decedent.

5. *The Damages Requested by Plaintiff*

The plaintiff has sought on behalf of the estate and herself the following damages from the defendants, jointly and separately. The trial court described the plaintiff's alleged damages as follows:

> $2,134.65 for burial expenses;
>
> $984.60 for hospital and medical expenses;
>
> $55,000.00 for loss of consortium and grief as the surviving spouse;

$2,000,000.00 for mental anguish and physical pain suffered by the decedent prior to his death;

$455,000.00 for pecuniary loss, namely loss of future earnings of the decedent, and,

$250,000.00 for grief and loss of companionship of the children.

The plaintiff also sought $1,500,000.00 in punitive damages from the defendant Rotramal.

We have called attention to the numbers which were contained in the complaint of the plaintiff and which the judge mentioned in his instructions for the purposes of explaining, in part at least, how the jury arrived at the verdict returned. This court is not in a favorable position to issue a remittitur with respect to these damages.

The judgment of the district court should be and the same is hereby affirmed.

Nos. 82-2164 and 82-2175

ROSE MARIE TUTTLE, etc. v. CITY OF OKLAHOMA CITY, etc., et al.

BARRETT, Circuit Judge, concurring:

I concur because I am convinced the trial court properly and adequately instructed the jury. Even so, I am at a loss to ascertain the basis for the jury's obvious finding that Officer Rotramel was so lacking in training to cope with robberies that such constituted *proof* of Oklahoma City's violation of its duty to train Officer Rotramel to the extent that, as the opinion pinpoints it, it amounted to Oklahoma City's "deliberate indifference to the rights of its citizens."

I have not been able to ascertain what facts the jury relied on to render Officer Rotramel's actions unreasonable. The factual background, as I view it, consists of the

false call placed by Mr. Tuttle about the robbery at the Club involving an armed person who met his description, Officer Rotramel's immediate confrontation with Mr. Tuttle upon entering the Club, Rotramel's identification of Tuttle as the reported armed robber, Rotramel's testimony that he saw Tuttle reach down at which time Tuttle was ordered to stay put, Tuttle's hurried exit from the Club in the darkness with Officer Rotramel in pursuit, the fatal shooting by Rotramel when he observed Tuttle bent down near a vehicle and reaching for that which Rotramel believed to be a gun, and finally the discovery of a toy pistol on Mr. Tuttle's person following the shooting. Beyond this, I have not been enlightened with the factual basis of Oklahoma City's "deliberate indifference" in the context of the facts of this case.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF OKLAHOMA

ROSE MARIE TUTTLE, Individually and as Administratrix of the Estate of WILLIAM ADAM TUTTLE, Deceased,

Plaintiff,

vs.

CITY OF OKLAHOMA CITY, a municipal corporation, and OFFICER JULIAN ROTRAMEL, Individually and as an employee of the City of Oklahoma City Police Department,

Defendants.

PORTIONS OF TRANSCRIPT OF JURY TRIAL

(p. 23) Mr. Gassaway: May I proceed, your Honor?

The Court: Surely.

Vonnie Hinds called as a witness, having first been duly sworn, testified as follows:

Direct Examination

(p. 24) Q. Will you state your full name for the court and record, please ma'am?

A. Vonnie G. Hinds.

Q. And where do you reside?

A. 3828 Southwest 25th.

Q. And how old a woman are you?

A. 43.

Q. Are you employed?

A. Yes, I am.

Q. Where are you employed?

A. Walnut Creek Nursing Home as a cook.

Q. How long have you been so employed?

A. Since the first of February.

Q. 1982?

A. Yes.

Q. On October 4, 1980, were you at the Will Do Club?

A. Yes. I was on duty.

Q. Will you tell us where the Will Do Club is located?

A. On the corner of Tenth and Portland.

Q. North Tenth and Portland?

A. Yes.

Q. What were you doing at the Will Do Club on October 4, 1980?

A. I was reporting to work as a bartender.

Q. Will you briefly describe your duties as a bartender?

A. Mixing drinks, waiting on customers, cleaning tables, (p. 25) socialize with the people that come in.

Q. What time did you arrive at the Will Do Club on October 4, 1980, if you can recall?

A. Approximately 3:00 or 3:30, somewhere around there.

Q. Did you observe William Adam Tuttle in the club any time during that day?

A. Yes, I did. He was in off and on all day.

Q. Prior to October 4, 1980, did you know William Adam Tuttle?

A. Yes, I did.

Q. When did you first make his acquaintance?

A. I knew Bill about two years, approximately two years.

Q. And were you a social friend of his?

A. We were all good friends.

Q. Okay. On October 4, 1980, had William Adam Tuttle had anything to drink?

A. He had been drinking.

Mr. Gassaway: Now, may I approach this witness, your Honor?

The Court: Surely.

Q. Ms. Hinds, I want to draw — I'm not much of a drawer — but I would like to draw roughly the Will Do Club, if that's okay. Ms. Hinds, I've drawn a square in the middle of that white piece of paper. Would that be a fairly accurate, a fairly accurate representation of the physical shape of the Will Do Club?

(p. 26) A. That's close.

Q. Do you have your bearings as to which is north, south, east, and west?

A. Yes.

Mr. Hughes: Excuse me, your Honor, may I speak with Mr. Gassaway?

The Court: Sure.

Mr. Gassaway: Your Honor, I apologize. May I take care of this one matter here?

The Court: Sure.

Mr. Gassaway: May I approach the bench, your Honor?

The Court: Sure.

(Whereupon, the following conference was had at the bench out of the hearing of the jury:)

Mr. Hughes: Concerning the records, we were contacted by R. Eugene Griffin of the City of Oklahoma City

Police Department. He advised he would have the records here. Yesterday afternoon we had entered into an agreement with Captain Adams — he's head of the Oklahoma Police Training Academy — to advise the witnesses to be on a 15 or 20 minute call. He would provide anyone we needed. We called at 8:15 this morning and said either Griffin or anyone else could bring the records. We also called the main office and left a message.

(p. 27) Mr. Hughes: Now, they say—

The Court: Wait just a minute. We can't take everyone at the same time.

Mr. Hughes: Excuse me, your Honor, but our investigator just called and they said they had no responsibility for these people. We had instructed that they be down here this morning, so we could have these witnesses ready to go, and they told us that they were having some graduation ceremonies this morning, and they asked our indulgence. We agreed that we didn't want to mess up their graduation ceremony, but we subpoenaed Captain Adams to bring certain documents and records. Then they tell us that Captain Adams isn't the custodian of those records, or somebody else is, and Captain Adams is the custodian. We issued a subpoena for Captain Adams and he says, I'm not the Custodian either, after these people tell us he was, and I don't —

The Court: Wait just a moment. Mr. Adams is —

Mr. Hughes: Training Academy.

Mr. Mahoney: Officer Adams is the Commander of the Police Training Academy. He is the custodian of anything used in Police Training, that's what he is bring-

ing. Captain Griffin is custodian of the records of the Police Department for reports and —

The Court: Let me ask you this: Did you all know what the Plaintiffs wanted, which records, and which —that they wanted?

Mr. Hughes: Here's the subpoena.

The Court: I don't want any games played about who is in charge. Do you know what they wanted, and do you know who has them?

Mr. Mahoney: I know Captain Adams has custody of the records if they want —

The Court: I shouldn't have to referee a bunch of Who Shot John, about you subpoenaed the wrong guy. You all know what they want and who has it. Get it over here.

Mr. Mahoney: Okay. What items did you want?

Mr. Gassaway: Exactly what was served and what's on the subpoena.

The Court: Let me ask you this: Does Neal Adams have everything you want?

Mr. Gassaway: We assume.

Mr. Hughes: Griffin.

The Court: Griffin. I want both here with what they're asking for by 10 o'clock this morning.

Mr. Hughes: Do you need the subpoena to comply with it?

The Court: Wait just a moment.

Mr. Mahoney: I'm going through this — the tape of William Adam Tuttle and Rose Marie Tuttle—this was

(p. 29) destroyed. It was destroyed the first of '82 before it was asked for. She was given notice to pick it up. She did not pick it up.

Mr. Hughes: She was —

The Court: You'll have an opportunity to explain that. He's got to bring everything that he has.

Mr. Hughes: Let's get somebody to testify it's been destroyed.

Mr. Mahoney: Well, now, the dispatcher's statement —

Mr. Hughes: Your Honor, the problem with the dispatcher tape is the tape itself has audible signatures on it that show that the tape had been turned on and then turned off, and they're very audible on the tape, and it clearly was edited, and the Court's Order was not for an edited tape.

The Court: We'll take that up later. What I want is to get everything over here that have the items that were subpoenaed.

Mr. Mahoney: Sir, the only thing here's the City Police Department Manual. I have given copies, all the relevant copies asked for.

The Court: Do you have an agreement on that?

Mr. Mahoney: That's all that's left.

Mr. Hughes: We have got copies of certain sections of the Police Department Manual. We want a Police Department Manual.

The Court: Had you furnished the Police Manual or just—

Mr. Mahoney: Same ones. I copied off—

Mr. Hughes: The sections of that Police Manual did not provide us with what I intend to interrogate the witness over.

The Court: Oh, you didn't give him a complete copy? Give him a complete copy. You can get a copy.

Mr. Hughes: We also need somebody to sponsor these exhibits. It's my understanding they wouldn't waive identification of them.

Mr. Mahoney: All right. Well, I gave — at least the same exhibits. I've had the —

The Court: Let's go ahead, gentlemen. Let's don't get into any unnecessary fights. Well, if you're waiving identification, you don't need the custodian of the records.

Mr. Gassaway: If he waives identification of every item on there — what about when and why this was destroyed and about why —

The Court: You'll need a witness over there who would testify about when and how the property was destroyed. They'll need a person or someone who can explain that.

Mr. Mahoney: Who do you want to —

(p. 31) Mr. Gassaway: I don't know, whoever did it.

Mr. Mahoney: Do you still need Captain Adams or Captain Griffin?

Mr. Gassaway: Yes, sir.

The Court: Okay. Let's go gentlemen.

(The following proceedings were had within the hearing of the jury:)

The Court: Go ahead.

Q. Ms. Hinds, does the Will Do Club have any windows?

A. One small one in the back storeroom, but that's all.

Q. No visible windows one can see to look into the premises?

A. No.

Q. And does the front door have a spring on it to keep it shut every time it's opened?

A. It did at that time, yes.

Q. So would it be fair to categorize the building as a blind building? In other words, you can't see in from the outside?

A. Yes.

Q. Okay. Now, I've drawn in a little line there from the door down south. Would that be a fair rough description of the sidewalk there?

A. Yes, it is.

Q. All right. Now, on the 4th day of October, 1980, at approximately 8:00, did you have occasion to observe a police officer come into the premises?

(p. 32) A. Yes, I did.

Q. And would you tell the jury briefly about what you first observed?

A. Well, he just walked in and he motioned for me to come to the door.

Q. Now, did he come in the west door?

A. No. He come—Yes, west side, front door.

Q. And what did you observe about his demeanor? Did he appear to be nervous?

A. No. He just walked in and kind of looked around and wanted me to come to the front door.

Q. All right. Did he have his gun drawn?

A. No, sir.

Q. And did you obey his command to come to the front door?

A. Yes, I did. I asked Beverly Hayes to get behind the bar and I walked around the bar and down to the front door.

Q. And did you have a conversation with the officer at that time?

A. Yes, I did.

Q. And what, if any, conversation took place?

A. He asked me if I was having any problems there, and I told him, no, and he said there was, they had just got a burglary report, a call of a burglary being in progress there.

Q. Armed robbery in progress?

A. In progress and I laughed, and I said, "Not here," and I (p. 33) said, "everybody's having a good time."

Q. And approximately how many people would you estimate were in the club at that time?

A. About 10, 15 people, closer to 15.

Q. And did you know many of the people in the club?

A. Quite a few.

Q. And after you told him that he must have the wrong place, that there's nothing wrong there, what, if anything, happened next?

A. Well, Bill then walked up behind me and started to go out the door.

Q. Now, would "Bill" be William Adam Tuttle?

A. Yes.

Q. And when he started to go out the door, what occurred?

A. The officer asked him to wait a minute until he finished talking to me.

Q. And did Mr. Tuttle wait?

A. He said, "Okay," and he stood there for a second.

Q. All right. And then what did the officer — at this time was the officer restraining Mr. Tuttle in any way?

A. No.

Q. Did he have his hands on him?

A. No, he did not.

Q. Did he interrogate him?

A. No. He just said to wait.

(p. 34) Q. Did the officer appear to be suspicious of the man, watching him or anything?

A. He was talking to me.

Q. Did William Adam Tuttle do anything unusual or suspicious?

A. Right after that, he took off out the door.

Q. Okay. But before he took off out the door, did he do anything like talk mean to the policeman?

A. No, sir.

Q. Did he make any gestures of any sort?

A. No.

Q. Did he make any movements like he was trying to go for a weapon of any sort?

A. No.

Q. Now, when the officer turned back around to talk to you, what did he say to you?

A. He just started talking about was I sure that there was no problem there.

Q. And where were the three of you standing?

A. Right there in front of the west door. The officer was to one side, I was right in the middle, and Bill was on the other side.

Mr. Gassaway: May I approach this witness, Your Honor?

The Court: Surely.

Q. Ms. Hinds, I'll hand you what's been marked for (p. 35) identification purposes as Plaintiff's Exhibit 4-A and ask you what the photograph purports to be?

A. It's a picture of the front door coming into the club.

Q. Ms. Hinds, will you put three "X's" where the three of you were standing? Does that show up?

A. Yes.

Q. Okay. And this is at the west door approximately right here; is that correct?

A. Yes.

Mr. Gassaway: We move for the admission of Exhibit 4-A.

The Court: No objection. Be admitted.

Mr. Gassaway: May I approach the witness one moment again, Your Honor?

The Court: Sure.

Q. Ms. Hinds, I'll hand you what's been marked for identification purposes and introduced as Plaintiff's Exhibit 4-A, can — you've made three "X's" — can you hold it up to the jury and show which "X" is who?

A. Well, the police officer was standing right here. I was right here in front of him and Bill was right here to the side of me by the door.

Q. Where's the door?

A. Right here.

Q. Right here. Okay. Thank you. Now, did you have the (p. 36) opportunity to observe the officer and the deceased, William Adam Tuttle, standing there side by side?

A. Yes, pretty much so. I was right in front of them.

Q. Will you tell the jury how they compared in size?

A. He looked a good two heads taller than Bill.

Q. The police officer?

A. Yes.

Q. And did the police officer ever appear nervous prior to Bill going out the door?

A. No. Other than just telling him to wait there.

Q. Now, did he go out the west door?

A. Yes.

Q. And what happened next?

A. Bill, in my opinion, darted out the door, and the officer whirled around after him. He had his hand on his gun and just whirled around.

Q. Did you hear the officer say anything?

A. I don't know what he said.

Q. Did you hear anything like, "Halt"?

A. No.

Q. "Stop"?

A. No.

Q. "You're under arrest"? "Wait a minute"?

A. No, I did not.

Q. Anything — if there would have been anything loud, would you (p. 37) have been able to hear it?

A. Yes.

Q. And then what happened, Ms. Hinds?

A. He had the door propped open with his foot and he fired, and the officer turned around and came back in and motioned for me to come back, to come outside immediately.

Q. Did he try to chase him down at all?

A. No. He just whirled.

Q. Ms. Hinds, what kind of man was William Adam Tuttle?

A. He was a friendly sort of guy. I mean he never bothered anybody. He wasn't violent.

Q. Had you ever known him to have any weapons of any sort?

A. No.

Q. Did you say anything to the policeman when you went outside?

A. I did after I got outside. I asked him why he shot him, he didn't do anything.

Q. Did Mr. Tuttle appear to be baiting the police officer into shooting him in any way?

A. Not—there was no indication of any trouble going on or nothing like that.

Q. How would you describe the police officer after the shooting? What was his demeanor?

A. To me he was just indifferent. He was doing his job.

Q. Did he appear to be shook up at all?

A. Not to me he didn't. He was more concerned about getting me (p. 38) outside.

Mr. Gassaway: May I approach the witness again, your Honor?

The Court: Surely.

Q. Thank you. Ms. Hinds, I'll hand you what's been marked for identification purposes as plaintiff's Exhibit 4-B, and I'll ask you what the photo shows?

A. The front door at the corner of the building.

Q. And does that accurately depict the distance from the front door of the building to the south sidewalk?

A. Yes.

Q. And although the building is a different color, are the dimensions the same as they had been?

A. Yes.

Q. The building hasn't changed?

A. No. Huh-uh. They just—

Q. I'll hand you what's been marked for identification purposes as plaintiff's 4-C and ask you if that's a view from the south sidewalk back up to the door?

A. Yes, it is.

Q. And that's at the Will Do Club?

A. Yes, it is.

Q. I'll hand you what's been marked for identification purposes as plaintiff's Exhibit 4-D and ask you if that's the same view from the south sidewalk up to the door on the night of (p. 39) October 4, 1980?

A. Yes.

Q. And does anything unusual appear to be down at the south end of the sidewalk?

A. There's blood on the ground.

Q. And I'll hand you what's been marked for identification purposes plaintiff's Exhibit 4-E and ask you if this is a photograph that shows the view from the south edge of the sidewalk back to the east?

A. Yes, it does.

Q. I'll hand you what's been marked for identification purposes as plaintiff's Exhibit 4-F and ask you what that photograph shows?

A. Blood all over the ground.

Q. Whose blood is that?

A. Bill's.

Q. And was that there on that night?

A. Yes.

Q. Did you have to clean that blood up?

A. Yes, I did, the next morning.

Q. What did it take to get that blood up?

A. Three big gallon jugs of bleach.

Q. Finally I'll hand you what's been marked for identification purposes as plaintiff's Exhibit 4-G and ask you if that's a different view of that same thing?

(p. 40) A. Yes, it is.

Mr. Gassaway: Your Honor, we'll move to admit plaintiff's Exhibits 4-B through 4-G.

Mr. Mahoney: We object to 4-B and C.

The Court: All right. The others will be admitted. May I see counsel at the bench?

(The following proceedings were had at the bench out of the hearing of the jury:)

The Court: Wait just a minute. We need Mr. Gassaway. What is the basis of your objection?

Mr. Mahoney: Taken in the daytime, sun is different, doesn't reflect what it was like at the time of the shooting.

The Court: Different?

Mr. Mahoney: Different color, repair and such like that, and the sidewalk, to show the sidewalk scene that night.

The Court: All right. Objection will be overruled. They'll be admitted.

Mr. Gassaway: Thank you, your Honor.

(The following proceedings were had within the hearing of the jury:)

Q. Now, you specifically told Officer Rotramel that there was not an armed robbery in progress, did you not?

A. Yes, I did.

(p. 41) Q. And he didn't appear to misunderstand you, did he?

A. No. I'm sure he understood me.

Q. Made yourself clear?

A. Yes.

Q. You didn't appear to be nervous or anything?

A. No.

Q. What did you think when he came in and asked you if there was an armed robbery?

A. I was very surprised.

Q. Okay. Would you characterize William Adam Tuttle as being a suspicious person?

A. No.

Q. After the police officer asked you to come outside and you asked him why he shot him because Bill Tuttle didn't do anything wrong, what happened next?

A. Another officer ushered me over to a scout car and told me I had to get in, and I asked him why, and he said I had to go downtown.

Q. All right. And did you?

A. I told him I didn't want to go downtown. I didn't have anything to say.

Q. What were you told?

A. I was told to get in the scout car or I would be arrested and held in jail.

Q. And then did you go downtown?

(p. 42) A. Then I went and got in the scout car.

Q. Were you pretty shook up at that time?

A. I sure was.

Mr. Gassaway: I believe that's all.

The Court: Mr. Mahoney, cross-examination?

Mr. Mahoney: Can I see Exhibit 4-A? Could I give this to the witness, please?

Cross-Examination

By Mr. Mahoney:

Q. Ms. Hinds, were you working at the Will Do Club that night?

A. Yes, I was.

Q. And you're a bartender?

A. Yes, I am, or was at that time.

Q. When the officer entered the club, did you have a suspicion why the officer was there?

A. No. I just thought they were going to make a routine check. They come in and check bar cards and club cards and such things, make sure you've got them.

Q. So when you first saw the officer, you thought he was checking to see if there were any club violations?

A. Yes.

Q. All right. What did you do when the officer entered the club?

A. My bar card had expired that day, so I asked Beverly to get behind the bar.

(p. 43) Q. Who is Beverly?

A. Beverly Hayes is the manager of the club.

Q. All right. And what did you do?

A. Well, that's when the officer motioned for me to come to him. And then I went down, I went out around the counter.

Q. Stayed behind the bar? Stayed behind the bar when the officer entered?

A. No. No, I went to the end of the bar.

Q. And did you—

A. The far end of the bar.

Q. Did you move out from behind the bar?

A. Yes and walked around to the front door.

Q. On that picture in front of you, Plaintiff's Exhibit 4-A, is there a telephone in that picture?

A. Yes, there is.

Q. Had you seen William Adam Tuttle use that telephone that night?

A. Yes. He had used the phone several times.

Q. When was the last time you saw him use the phone?

A. Oh, I guess, about 20 minutes, maybe 10 minutes before this happened. I don't know exactly, because he was off and on on the phone.

Q. Okay. Were you serving drinks to Bill Tuttle that night?

A. Yes, I was.

Q. What were you serving?

(p. 44) A. He was drinking whiskey and Club Coke.

Q. How long had you been there, off and on?

A. No. I got there at 3:00 because I usually got up a little early, sat and talked to people who were there, and he was in and out that period of time before I went on duty at 5:00.

Q. Was he drinking all the time?

A. Not steady. He was drinking, but not steady.

Q. How much had he drunk?

A. I take different amounts to different people.

Q. How much did he drink?

A. Since I got there?

Q. Yes, since three o'clock when you got there?

A. Not exactly a lot. He had been drinking, but not heavy.

Q. All right. When did—did you give a statement to the police after this incident occurred on October 4th?

A. Yes, I sure did.

Q. Did you speak with William Adam Tuttle after he made the last phone call?

A. Yes, I did.

Q. Was his behavior any different?

A. Yes, he come back down to the bar. He ordered a double shot of bourbon and coke. And he was shaking

and I asked him what was wrong and he said, "nothing anymore," and I asked him to move because he was sitting in someone else's place.

Q. And that was right after he used the phone?

(p. 45) A. Shortly after that.

Q. How long was it after he used the phone that Officer Rotramel arrived?

A. I really couldn't say for sure. It wasn't too long, I don't believe.

Q. Did Officer Rotramel motion for William Adam Tuttle to approach him?

A. No. He just motioned for me to come to the door. Bill was walking up to the door behind me.

Q. Did Bill walk right up to Officer Rotramel?

A. No. He started to go out the door.

Q. And was he stopped?

A. Pardon?

Q. Was he stopped by Officer Rotramel?

A. Yes.

Q. What was Bill Tuttle wearing that night?

A. Kind of a colored shirt, I believe, rose-tinted glasses, and I'm not sure if he had jeans on or dress pants. I couldn't say for sure.

Q. What color hair did Bill Tuttle have?

A. Sort of a sandy brown.

Q. All right. Did you hear any conversation between Officer Rotramel and William Adam Tuttle?

A. All I heard him say was wait till I finish talking with me.

Q. Okay. You heard him saying that to Bill Tuttle?

(p. 46) A. Yes.

Q. Did you—did they have any other words between them?

A. No, sir.

Q. All right. And how long was it from when Bill Tuttle approached Officer Rotramel to when he took off out the door?

A. Well, he stood there just for a few seconds and then he darted out the door, and the officer whirled with his hand on his gun behind him.

Q. Did you hear Officer Rotramel say anything to William Adam Tuttle when he went out the door?

A. He said something, but I don't know what it is. I don't know what he said.

Q. Okay. Was the music playing in the bar at this time?

A. Of course.

Q. How loud does the music play in a little bitty club?

A. Not real loud because I didn't like it real loud.

Q. When Bill Tuttle took off from where you were standing and Officer Rotramel whirled after him, was he facing him or was his back to Officer Rotramel?

A. He was facing me.

Q. So when Bill Tuttle—

A. Bill was to the side of me.

Q. All right. When he said something to—that you didn't hear—to William Adam Tuttle, was he facing you when he said that?

(p. 47) A. When Bill darted out the door and he whirled around after him, I started backing up away from the door to get away from the door.

Q. How far did you back up?

A. I was almost to the center of the room when the gun was fired.

Q. Okay. Did you see where William Adam Tuttle was when the gun was fired?

A. Only after the officer had me go back outside.

Q. So William Adam Tuttle was out of your view when Officer Rotramel fired, is that correct?

A. Yes.

Q. Okay. Did you ever see Officer Rotramel put his hand on William Adam Tuttle in the club?

A. No.

Q. Ms. Hinds, are you friends with the plaintiff, Rose Marie Tuttle?

A. Yes, I am.

Q. You know her socially?

A. We've of—I've known her about close to five years.

Q. Longer than you've known William Adam Tuttle?

A. Yes.

Q. Have they ever lived with you?

A. Yes, they did.

Q. When did they?

(p. 48) A. Oh, Lord, I don't know for sure, but it was a couple of years ago, I'd say for, I'd say about six months or so before all this happened, possibly eight months.

Q. Okay.

A. They'd just moved back to town and they stayed with me then.

Q. Are you familiar with their, when they're having fights and when they're getting along well?

A. I don't know anybody that don't have quarrels.

Q. Well, between these two people were you familiar with their having fights?

A. I wasn't around them all that much.

Q. Did you know of instances where they had fights with each other?

A. Everybody knew they quarreled, yes.

Q. Okay. Had they had a fight on October 4, 1980?

A. It was—to my understanding there was a disagreement, yes.

Q. Did William Adam Tuttle speak to you about that fight with Rose on that night?

A. Yes, he did.

Q. What did he say?

A. He just said they were arguing again.

Q. Had they ever separated before?

A. Yes, a time or two.

Q. When was the last—when was—before the shooting when was the last time they had separated?

(p. 49) A. They were just getting back together. They had been back together, I guess, maybe possibly two or three weeks before this. I'm not sure.

Q. Okay. Was William Adam Tuttle living in Oklahoma City with Marie, Rose Marie at the time this happened?

A. Yes. He was staying there.

Q. How long had he been staying with her?

A. I really don't know because I wasn't around him much at that time.

Mr. Mahoney: No more questions, Your Honor.

The Court: Redirect?

Redirect Examination

By Mr. Gassaway:

Q. You said that William Adam Tuttle had something to drink, didn't you?

A. Yes, I did.

Q. I believe you said it was bourbon?

A. Yes.

Q. And if they were—everyone was standing face to face like that, would the officer, or should the officer have been able to smell alcohol on his breath?

A. Yes. He'd been there long enough that you could have smelled it.

Q. Now, while they were inside, you didn't ever see William Adam Tuttle go for a boot or anything, did you?

(p. 50) A. No.

Q. And when you were talking to the officer and you heard Bill say, why do I have to stay here to the officer, you all were speaking in, would you characterize it as normal conversation voice?

A. All Bill said was, "okay."

Q. I mean you were talking to him and the officer was talking?

A. Everyone was talking just like I'm talking now more or less. Maybe I'm a little shaky now, but—

Q. No one was shouting?

A. No.

Q. And the club is a pretty small club, isn't it?

A. Yes.

Q. And if one were to have yelled, you would have been able to hear it, wouldn't you?

A. Yes. I would have heard it, I'm sure.

Q. But whatever Officer Rotramel said to him on that night, he didn't say it loud enough for you to hear it, did he?

A. No, he said something, but I don't know what it was.

Q. Now, they've asked you about the marriage between William Adam Tuttle and Rose Marie Tuttle. Rose hasn't re-married, has she?

A. No, she hasn't.

Q. How would you characterize the marriage of William Adam Tuttle and Rose Marie Tuttle? Would you characterize it as a (p. 51) normal marriage?

A. Just like any other newlyweds have a lot of problems getting adjusted to one another.

Q. And William Adam Tuttle had two children from a previous marriage, didn't he?

A. I knew of the one that he talked about. I do believe he had two.

Q. And he had a five-day old baby from the marriage to Rose at the time, is that correct?

A. Three days.

Mr. Gassaway: Three days. That's all, Your Honor.

The Court: Re-Cross?

Re-Cross Examination

By Mr. Mahoney:

Q. How far was William Adam Tuttle from Officer Rotramel when he ran by?

A. They were right there in the doorway.

Q. Was William Adam Tuttle closer to Officer Rotramel than you were when they ran by?

Mr. Gassaway: If the court, please, I'll object to that characterization as "running by." I don't believe that's the—

Mr. Mahoney: I believe those are her words, Your Honor.

(p. 52) A. No, I said, he darted out the door.

Q. All right. Excuse me.

A. We were all kind of at a triangle more or less. We were pretty much the same—

Q. When Officer Rotramel said something to William Adam Tuttle that you didn't hear, how—where was William Tuttle when Officer Rotramel said that?

A. Right to the side of me.

Q. It was before he darted out?

A. When Bill first walked up there, he asked him to wait until he finished talking to me.

Q. All right. You heard that?

A. Yes, sir. I was right there in front of him.

Q. You said later he said something, but you just—

A. That was as he was whirling out the door, and I was backing up away from the door.

Q. Okay.

A. And I could not understand what he said.

Mr. Mahoney: I see. Thank you.

Mr. Gassaway: May this witness be excused, Your Honor?

The Court: She'll be excused. Call your next witness.

Mr. Gassaway: It's past the hour of ten, so I'm going to check and see if our custodian of records is here, (p. 53) Your Honor. Your Honor, there's still not a custodian.

The Court: Call your next witness then, if you will.

Mr. Gassaway: Thank you, Your Honor. Beverly Hayes, Your Honor.

The Court: Come forward and be sworn, Ms. Hayes. Swing that microphone so you can speak directly into it if you will, please.

Beverly Jean Hayes
Direct Examination

By Mr. Gassaway:

Q. Will you state your full name for the court and record, please ma'am?

A. Beverly Jean Hayes.

Q. Where do you live, ma'am?

A. 7601 Northwest Sixth, Apartment 168.

Q. Are you a married woman?

A. Yes.

Q. And may I ask you how old you are?

A. 36.

Q. And do you—are you employed at the present?

A. Yes.

Q. And where are you employed?

A. The name's been changed. It's the Blue Fox. It was the Will Do Club.

(p. 54) Q. Okay. But you now work at what they call the Blue Fox Club?

A. Yes.

Q. Is that located at Northwest Tenth and Portland?

A. Yes.

Q. And what is your job? What do you do there?

A. I'm manager.

Q. Did you have occasion to be at the Will Do Club at the corner of Northwest Tenth and Portland on the 4th day of October, 1980?

A. Yes.

Q. And what time did you arrive there if you recall?

A. Seven o'clock.

Q. And did you see William Adam Tuttle there when you arrived?

A. Yes.

Q. Did you know William Adam Tuttle?

A. Yes.

Q. How long had you known him at that time?

A. Approximately a year.

Q. Did you know him socially or just from up there at the Club, or how did you know him?

A. I met him up there, but he had meals at my house, him and his wife, and it was, we went other places, it wasn't just there.

Q. Okay. What type of man was William Adam Tuttle?

A. Very easy-going, quiet.

Q. Had you ever known him to carry a weapon?

(p. 55) A. No.

Q. Had you ever known him to own a gun?

A. No.

Q. Had you ever known him to be in any type of fight?

A. No.

Q. Around eight o'clock that night, October 4, 1980, were you still in the club?

A. Yes.

Q. Did you observe a police officer come in that club?

A. Yes.

Q. Will you tell the jury what you observed happening when this officer came into the club?

A. One police officer came in.

Q. Okay. Tell the jury what happened.

A. He come in, and he motioned for Vonnie, who was the bartender at the time, to come down and talk to him. He said he had a report of a robbery or some kind of problem in there.

Q. Did you hear that?

A. Yes.

Q. And what—did Vonnie Hinds respond to that?

A. She said, "There's no problem here." She kind of laughed at him like, and she says, "You must have the wrong place."

Q. Okay. And you heard that?

A. Yes.

Q. What was William Adam Tuttle doing at that time?

(p. 56) A. He was standing next to me and he just kind of walked towards the front door, towards the police officer, and he started, and he went around the police officer, and he started out the door.

Q. And what happened?

A. The police officer asked him either to halt or wait. He needed to talk to him, but he wanted to talk to Vonnie first.

Mr. Gassaway: May I approach the witness, Your Honor?

Q. Mrs. Hayes, we've got a rough drawing up here. That's the north and south and east and west. This is supposed to be the Will Do Club, okay? And this is the basic structure of it. Did he come in the front door, the police officer?

A. Yes.

Q. And that is the west door, is that correct?

A. Yes.

Q. And I'll hand you what's been introduced as plaintiff's Exhibit 4-A. Does that show where the front door is?

A. Yes.

Q. Okay. And if you went back this way in this picture, you'd be back in the club, is that right?

A. Yes.

Q. And Ms. Hinds has marked three "X's" where she and the police officer and William Adam Tuttle were at this time? Is that basically where you remember them to be?

(p. 57) A. Yes.

Q. All right. Now, you've said that the police officer said, Halt a minute or wait a minute? Did Mr. Tuttle respond?

A. Yes, he did.

Q. Did he wait?

A. Yes. He just come right back where he was standing right, you know, very close to him, you know.

Q. Okay.

A. I mean he didn't make no moves to go the other way or nothing like that. He stood there and waited at this time.

Q. All right. Okay. Now, were they all standing there side by side?

A. Yes.

Q. Did the police officer appear to be hanging or holding on to William Adam Tuttle in any way?

A. No.

Q. Did William Adam Tuttle do anything improper to the police officer at that time?

A. No.

Q. Say anything mean to him?

A. No.

Q. Make any movements like he was going to hit him or attack him or anything?

A. No.

Q. Make any movements like he was going to get a gun out of his (p. 58) boot or anything?

A. No.

Q. Okay. What happened next? Did the police officer turn around and start talking to Vonnie Hinds again?

A. Yes.

Q. Okay. Did you hear any of that conversation?

A. No. I heard him—he was asking her if there was a problem there, and other than that, you know, I really didn't hear a whole lot.

Q. Now, did William Adam Tuttle do anything whatsoever to try to bait the officer into shooting him or grabbing him or anything there?

A. No. He wasn't, he wasn't making any motions to do anything at all out of line.

Q. Which person was the larger person, the police officer or Bill Tuttle?

A. The police officer was a whole lot larger.

Q. Can you give me an estimation of how big, how tall you think William Adam Tuttle was?

A. Probably five, seven or eight.

Q. Okay. Can you give me an estimation of about how much he weighed?

A. Between 140 and 145.

Q. Wasn't a big man?

A. No. He was, he was small.

(p. 59) Q. Could you characterize him as being slight of build?

A. Yes.

Q. And you specifically overheard Vonnie Hinds, the bartender, tell the officer there wasn't any armed robbery going on?

A. Yes.

Q. So the officer was made specifically aware of that?

A. Yes, from the very beginning.

Q. Okay. And then when the officer turned around to talk to Ms. Hinds, the bartender, what happened next?

A. Bill just kind of slowly walked around him and started out the door, and this police officer just kind of whirled around, and he propped the door open, and just laid back on his gun and just—and you could see the fire at the far end of the bar. You could see the fire from the

gun. He just propped that door open, and just put both hands on the gun, and he just laid back on it and shot him.

Q. Did you hear the police officer yell at him?

A. No.

Q. Did you—did the police officer try to run and tackle him?

A. No.

Q. Did he try to apprehend him in any way at all other than shooting him?

A. No.

Q. Okay. Had William Adam Tuttle acted suspicious in any way at this time?

(p. 60) A. No.

Mr. Gassaway: Now, may I approach the witness one more time, Your Honor? Thank you, sir.

Q. There has previously been introduced photographs of the Will Do Club, and I'll hand you what's been introduced as Plaintiff's Exhibit 4-B and ask you if that's a view of the west door here, looking down this sidewalk?

A. Yes.

(Photograph displayed to jurors)

Q. There's been previously introduced Plaintiff's Exhibit 4-C, and I'll ask you if this is a view of, standing approximately here and looking back up at the door?

A. Yes.

Q. Now, the club wasn't painted blue on October 4th, was it?

A. No.

Q. But the dimensions haven't changed any at all, or the—

A. No.

Q. And the building doesn't have any windows of any sort, does it?

A. No.

Q. And the door has a, had a spring on it on October 4, 1980, where if you opened the door it would shut back?

A. That's right.

Q. So you couldn't see in the club from the outside, could you?

A. No.

A. No.

(p. 61) Q. Okay, the view from the south looking to the north.

(Photograph displayed to jurors)

Q. I'll hand you what's been introduced as Plaintiff's Exhibit 4-B and ask you if that's the same view looking straight from the south back up to the north on the night of October 4, 1980?

A. Yes.

Q. And does it show where William Adam Tuttle was lying after he was shot?

A. Yes.

Q. And that's indicated by the blood spot?

A. Right.

(Photograph shown to jurors)

Q. And I'll show you what's previously been introduced as Plaintiff's Exhibit 4-e and ask you if this is a photo of the night of October 4, 1980, looking from about right here, looking back that direction to the east?

A. Yes.

(Photograph shown to jurors)

Q. I'll hand you what's been previously introduced as Plaintiff's Exhibit 4-F and ask you if that indicates the spot where William Adam Tuttle lay before the Amcare ambulance picked him up?

A. Yes.

Q. And does also 4-G indicate that from another slightly (p. 62) different angle?

A. Yes.

(Photographs shown to jurors)

Q. I believe you've already said this shows the west door being right here, is that correct? The people were standing approximately in this area right by the door?

A. Yes.

Q. On that night? And this is a photograph, October 4, 1980, is it not?

A. Yes.

Q. The door being right here.

(Photograph shown to jurors)

Q. Okay. Now, Mrs. Hayes, I've got the door kind of pushed out here. The door was actually level right there, is it not?

A. Yes.

Q. And when you go out the door, or for that matter in the door, does the door open in this direction?

A. Yes.

Q. All right. And the door is wider than the sidewalk, is it not?

A. Yes.

Q. Okay. So if one were to go out the door, it would swing out, and you'd have to go around the door to go to the south?

A. Yes.

Q. Okay. After he laid back on his gun and shot him, what did (p. 63) you do next?

A. I was behind the bar at this time because Vonnie had went down to talk to the police officer, and I stayed inside the bar.

Q. Okay. Now, before I go further, you've worked there for quite some time, have you not?

A. Yes.

Q. You worked there this day?

A. Yes.

Q. Would it be fair to state that the same group of people come there on a regular basis?

A. Yes.

Q. And was William Adam Tuttle one of that group?

A. Yes.

Q. Okay. And so he knew a lot of people in there, did he not?

A. Yes.

Q. All right. Now, after the shooting and you stayed in the bar, what was the next thing that occurred?

A. He motioned for Vonnie to go outside and—at this time when this incident happened, there was just one police officer and within minutes there was helicopters and all kinds of police cars that arrived, and they told us that we were going to have to go downtown.

Q. All right. And did you attempt to make a phone call at that time?

(p. 64) A. Yes.

Q. And who did you first attempt to call?

A. Charles North.

Q. And who is Charles North?

A. He owns the club.

Q. Did you make contact with him?

A. No.

Q. Why?

A. He was not at home.

Q. No one answered?

A. No one answered.

Q. Did you attempt to make another telephone call?

A. Yes.

Q. And who did you call this time?

A. The decedent's wife.

Q. Rose Marie Tuttle?

A. Yes.

Q. And did you make contact with her?

A. Yes, but no.

Q. What happened? Okay. Could you explain that?

A. I—he was telling me I was going to have to leave the club and told me that if I didn't cooperate, that they would put me under arrest and take me downtown.

Q. And did he make any physical movements to disconnect the phone?

(p. 65) A. Yes.

Q. What happened?

A. I had got Rose on the phone and I told her that there had been an accident, Bill had been shot and was outside, and this officer walked over and says, you're going to have to go outside now, and he just laid his hand on the receiver and disconnected it.

Q. Okay. Then what happened?

A. Rose had heard part of it and she called back, and I asked the police officer if I could answer the phone, and I really don't remember what he said, but I went ahead an answered it anyway, and I told Rose she needed to get

down there, because there was a problem, and I didn't know how bad it was.

Q. Then what was the next thing you did? Were you allowed to lock up the club?

A. No. I told him I had the keys to lock the club and he told me there was no need, that it was going to be roped off afterward, that I didn't have to lock it up.

Q. What happened next?

A. He forced me to get into a police car and I had to go downtown.

Q. Okay. And did anything unusual happen while you were in the police car?

A. When the ambulance arrived, all I can say is I recall seeing the nurse that was carrying a little black bag, she went over (p. 66) and they never opened the little black bag.

Q. Okay. Let me ask you this: did some months after that, did the police have occasion to come in and write you a ticket for some violations, not having paper towels and stuff like that?

A. Yes.

Mr. Mahoney: Your, Honor, I object to this as irrelevant.

The Court: Overruled.

Q. As a result of that, were you taken down to the police station?

A. Yes.

Q. And while you were there at the police station some several months later, did any police officer have occasion to say anything to you about that incident of October 4, 1980?

A. Yes.

Q. What did he say to you?

A. They just advised me it might be best that I forgot some of the incidents that happened that night.

Mr. Gassaway: That's all.

Cross-Examination

By Mr. Mahoney:

Q. Mrs. Hayes, who was that police officer you spoke with?

A. I don't know.

Q. Was he in uniform?

(p. 67) A. Yes.

Q. Did he have a name tag over his pocket?

A. I don't know. I mean, just like I told Vonnie, I don't know. I couldn't identify him if I had to.

Q. When the police officer first entered the club, where were you?

A. I was standing next to Bill.

Q. And where was that?

A. At the east end of the bar.

Q. How far were you from the front door?

The Court: Mr. Mahoney, before we complete cross-examination, let's take a 15-minute recess at this point.

Would that be agreeable? (Affirmative response). Ladies and gentlemen of the jury, we'll be recessed until a quarter of eleven, according to that clock. I want to remind you not to discuss this case or permit anyone to discuss it with you or in your presence. If they attempt to do so, report it to me upon your return. Everyone please stand until the jurors clear the courtroom. You may go ahead. Court is in recess.

(15-minute recess taken)

The Court: Be seated, gentlemen. The jurors will be here shortly.

Mr. Gassaway: May I be excused to go get the witness?

(p. 68) The Court: As a matter of fact, let me go get my courtroom deputy. Be seated, please.

Q. Mrs. Hayes, when you left, you said the police officer said that, told you to forget parts of the story, is that correct?

A. Yes.

Q. Have you spoken to the plaintiff, Rose Marie Tuttle, since that time, since October 4, 1980?

A. Have I spoken with her?

Q. Yes. About this case?

A. You mean personally with her?

Q. Yes. Has she spoken with you about the events in this case?

A. Yes.

Q. And has she pressured you on how the events of this story, the events of this incident that occurred?

A. No.

Q. Mrs. Hayes, do you remember September 16, 1981, you gave a deposition?

A. Yes.

Q. Grant Price was there? Steve Hendrickson of Mr. Gassaway's office was there?

A. Yes.

Q. Do you recall that? Do you recall giving that deposition?

A. Yes.

Q. Do you recall being put under oath to tell the truth?

A. Yes.

(p. 69) Q. In that deposition on page 5 at the bottom of the page, when the deposition started, did you make the following statement?

Mr. Gassaway: If the Court please, I will object to that as being improper use of the deposition. He can ask if that question was asked and the response to that question, the answer that was given, but I don't think the proper predicate has been laid for the statement.

The Court: All right. Go ahead, counselor.

Q. Did you make the following statement:

"I was—I was afraid of both of these people, the gentleman who got killed and this lady, his wife. Everytime I've been asked to come down here, everytime she keeps calling me at home or coming to the

bar or something like this. I feel like I'm being pressured from both sides."

Did you make that statement?

A. I don't really remember. I mean I made a statement the night that it happened. I made a statement for this deposition. I made a statement for Mr. Gassaway's office, and as I stand right now, I can't say I remember saying it, but possibly I did.

Q. Were you telling the truth in that deposition as you remember it at the time?

A. At the time, yes.

(p. 70) Q. All right. Mrs. Hayes, you were at the bar since 7 o'clock, is that correct?

A. Yes.

Q. And Bill Tuttle was standing by you, is that right?

A. Yes.

Q. Did you see what he was drinking?

A. Yes.

Q. What was he drinking?

A. I can tell what he had sitting in front of him. I didn't see him drink it. I can tell you what was sitting in front of him.

Q. What was sitting in front of him?

A. He had a shot with whiskey in it and a coke sitting there, possibly had whiskey in it.

Q. Okay. And you had seen him there since 7 o'clock?

A. He was there when I got there at 7:00.

Q. Well, you arrived at about 7:00?

A. Yes.

Q. And you stood next to him then?

A. Yes.

Q. Did he seem intoxicated to you?

A. No. He was very quiet and he had his head down towards the floor.

Q. Okay. What kind of condition was he in?

A. Very quiet.

(p. 71) Q. Was he always quiet like this?

A. He was never loud or out of line.

Q. Did he act like he did on this particular night, October 4th. Had you see him acting like that before?

A. He wasn't really acting any way. He was just standing there being quiet.

Q. Well, had you seen him acting like that before?

A. I can't say that he was acting. He was just standing there.

Q. Was he in a particular shape or condition there, different from what he normally was?

A. What kind of different shape are you saying?

Q. All right. Mr. Gassaway asked you earlier what kind of person was Bill Tuttle.

A. Very quiet, easy-going person.

Q. Okay. At the bar he had a shot of bourbon, and coke, and maybe, you don't know what was in that coke, or something, is that correct?

A. Yes.

Q. Are you a bartender at the Will Do Club?

A. Yes.

Q. Have you served that drink to Bill Tuttle before?

A. Yes.

Q. Okay. What does he usually drink?

A. Either bourbon and coke or beer.

Q. Does he drink shots of bourbon and coke or something that (p. 71) often?

A. If he drinks whiskey, that's what he drinks.

Q. Okay. And you don't know that Bill Tuttle was acting any different that night than he does normally, is that correct?

A. I don't know what you mean by normal.

Q. You know Bill Tuttle, don't you?

A. Yes.

Q. Or you knew him?

A. Yes.

Q. How long have you known him?

A. Approximately a year at the time.

Q. Were you friends with Bill Tuttle?

A. Yes.

Q. Were you on a first-name basis?

A. Yes.

Q. Were you familiar with how he acted?

A. Yes.

Q. Okay. Was he acting different on October 4th than he usually acted?

Mr. Gassaway: If the Court please, it's repetitious. She's already answered that the best of her ability.

The Court: Overruled. I'll let her answer if she can.

A. He acted like he might be upset, you know, but, you know, he (p. 73) was just quiet, like he might have a problem he was trying to adjust to or something like this.

Q. Had you ever seen him acting like that prior to this night?

A. Possibly something similar to it in the past, one or two times.

Q. And when was that?

A. Oh, I've seen him upset.

Q. When?

A. The exact date I don't know.

Q. Do you know about what time you saw him acting like this?

A. I've seen him like this on different occasions at times when he and his wife would have disagreements, like when people get married, you know, they have a few disagreements about things.

Q. Had they had a disagreement this night?

A. I don't know. Personally I can't say because neither one of them personally told me. Someone else had told me this, so personally I can't say whether they had a disagreement or not.

Q. Okay. Now you say Bill Tuttle normally came to the club, is that right?

A. When him and his wife lived in town. They moved away for awhile. I mean whenever they were in town they came in, yes.

Q. Had Bill Tuttle been—how long had Bill Tuttle been in town prior to this event?

(p. 74) A. Probably three or four days at this time.

Q. Okay. And he come into—had he come into the Club prior to that?

A. He and Rosey had moved away.

Q. When was the last time he had come into the Club prior to the first few days of October 1980?

A. Before he got shot?

Q. Yes.

A. I don't really—I can't answer because I don't really know, you know, I don't—what exactly day or time you're trying to get me to say.

Q. You said you'd never seen Bill Tuttle carry a weapon, is that correct?

A. Yes.

Q. And did you mean all kinds of weapons? Did you ever see him with something to hurt himself or someone else with?

A. I answered Mr. Gassaway's question to no guns, no knives.

Q. How about razor blades?

A. Have I seen one in his hand?

Q. Yes.

A. No. But there was one laying on the floor one time that was handed to me.

Q. Who handed it to you?

A. Charles North.

Q. When was that?

(p. 75) A. Six to eight months prior to this.

Q. And where was that?

A. In the Club.

Q. And was Bill Tuttle in the Club that night?

A. Yes.

Q. Was he drinking that night?

A. Yes.

Q. What was he drinking?

A. He started out on beer, and then he had a—he was in there for a long period of time.

Q. And what did he drink?

A. Then he had whiskey and coke.

Q. And had he had a fight with his wife this night?

A. They were having a disagreement at the time.

Q. Did he talk with you that night?

A. He was sitting at the bar. Yes, he talked to me but I was busy, but he talked to me when I could come over and talk to him.

Q. Did he make any—did he have any strange behavior that night in front of you?

A. He acted like he was upset.

Q. And what—did he act upset that night?

A. Just acted like he had a problem and was upset, like if you, most married couples have a few problems, and he acted like he wanted to go home, you know.

(p. 76) Q. Was this similar to the way he was acting on October 4, 1980?

A. Yes.

Q. And what did Bill Tuttle do on that night six months before—

Mr. Gassaway: If the Court please, we'll object to that and I ask to approach the bench.

(The following conference was had at the bench out of the hearing of the jury:)

Mr. Gassaway: If it please the Court, for the same reasons set out in our motion in limine and brief in support thereof, we'd object to all this evidence as being incompetent, irrelevant, and immaterial, and the prejudice would outweigh the probative value of any testimony.

The Court: What question or answer did you expect to elicit?

Mr. Mahoney: He cut his wrist with a razor blade, that he knew what he was doing, and his mental state, he wanted to cut himself.

The Court: Objection will be overruled.

Mr. Hughes: This is months before, months before. This is months before and just for the sake of saving time, Judge, may we have a continuing objection to this inquiry throughout the remainder of the trial?

The Court: Sure.

(The following proceedings were had within (p. 77) the hearing of the jury:)

Q. Mrs. Hayes, on that night at about six months before October 4 in the Will Do Club, what did you see William Adam Tuttle do?

A. I personally didn't see him do anything. Charles North—

Mr. Gassaway: If the Court please, I'll object to anything somebody else might have seen to be hearsay.

The Court: Only testify to what you have seen.

A. I know nothing personally of anything that happened. I know an incident happened. I didn't—I wasn't right there at the time it happened.

Q. You weren't there when it happened?

A. I wasn't in front of him when it happened. I was behind the bar, but I was just—

Q. Did he say anything to you that night?

A. Yes.

Q. What did he say to you?

A. At what period of time this night? I told you awhile and, I talked to him off and on all night long.

Q. All right. Did William Adam Tuttle cut his wrist in front of you?

Mr. Gassaway: If the Court please, she's already testified she had no personal knowledge of that, Your Honor.

The Court: Sustain the objection. Just ask the (p. 78) witness to describe what, if anything, she saw, Counselor.

Mr. Mahoney: Your Honor, I'd like to refer to a deposition, the same deposition I referred to earlier on September 16 in regard to her response to that question.

The Court: Ask her first what she saw and observed.

Q. Mrs. Hayes, what did you see that night?

A. I seen—well, I was—the owner of the Club was standing next to Bill, and he noticed that there was a puddle of blood on the floor and—

Mr. Gassaway: If the Court please, I would object to that and move it be stricken as something someone else saw, that would be—

A. And he—

The Court: Sustained. Just testify as to what you saw and what you observed.

A. I saw Bill's wrist cut, but I mean it was bleeding. I didn't see him cut it. It was bleeding.

Q. Did he say anything to you just prior to your seeing his wrist being cut?

A. He said that Harry, my husband and I, we'd—he said we'd always be [illegible]nds, and to tell Vicky that he—I don't remember exactly now he said it—he'd always care for her or something like this.

Q. And then that was just prior to his wrist being cut?

(p. 79) A. Probably, Oh, I'd say from within five minutes. It was just prior to it, yes.

Q. Okay. Did he seem distraught at the time?

A. Did he seem what?

Q. Did he seem emotionally upset?

A. He was just quiet.

Q. Was his voice in a level tone when he told you he thought a lot of you?

A. Yes, he was, like I was being complimented.

Q. And he wasn't acting unusually excited or—

A. He never got excited and showed emotion. I mean he didn't get loud at all.

Q. Okay. After you saw the pool of blood, did he attempt to help himself?

A. I didn't see. I was behind the bar.

Q. Did Charles North call your attention to the pool of blood on the floor?

A. Yes.

Q. Did you know where that pool of blood was coming from?

A. Yes, because I seen his wrist bleeding.

Q. Okay. Did he try to stop the bleeding?

A. Did Charles?

Q. Did William Adam Tuttle try to stop the bleeding?

A. No. Charles was, Charles told him that he thought he was just trying to get Rosie's attention and that they were (p. 80) having a disagreement, and he just asked him to leave, because—and so he went out the door, and my husband followed him down the street, and got one of these bar towels to tie his arm up, and Charles told me to call the police. In this kind of an incident, he wanted the police called. And he—

Q. Did the police come that night?

A. Yes. Charles had me put this razor blade that was down on the floor behind the bar, and later on an ambulance come, and later they arrested him for public drunk.

Q. Okay. Mrs. Hayes, let's go back to October 4th, 1980, when Officer Rotramel entered the club, how far were you from the door?

A. I was next to Bill at the east end, east end of the bar.

Q. Do you know about how many feet that is?

A. Probably about half as long as right in front of the—

Q. Jury?

A. —jury.

Q. Okay. And is it your testimony you could hear the conversation between Ms. Hinds and William Adam Tuttle and Officer Rotramel?

A. Between the three of them?

Q. Yes. Could you hear what was being said?

A. Yes, he never—he really didn't talk to Bill other than tell him to come back in, he needed to talk to him.

(p. 81) Q. Okay. And do you remember the words that Officer Rotramel used when he spoke to William Adam Tuttle?

A. He, first time when Bill started out the door, he either said halt or wait a minute.

Q. He said, "Halt"?

A. Not loud. He just said either halt or wait a minute, I need to speak to you.

Q. Loud enough that you could hear him saying it from halfway from the jury box to where you are?

A. At about the time as far as we are right now.

Q. And you could hear it?

A. Yes.

Q. William Adam Tuttle was much closer to him than you were, correct?

A. Yes, and he responded. He come back in and stood beside the police officer.

Q. Okay. Did you hear any other conversation between them?

A. Between him and the police officer?

Q. Yes.

A. No. He went back to talk to Vonnie and he said, I need, when I finish talking to Vonnie, I need to talk to you.

Q. So he told that to Bill Tuttle?

A. Yes.

Q. And Bill Tuttle went out the door after Officer Rotramel told him that?

(p. 82) A. He walked around him and went out the door, yes.

Q. Went out the door? Did Officer Rotramel say anything to William Adam Tuttle after he went out the door?

A. Not the second time.

Q. Okay. And when Officer Rotramel was holding the door open, could you see where William Adam Tuttle was?

A. No. All I seen was the fire from the gun and propping the door open.

Q. Did you see which way William Adam Tuttle left the building?

A. Yes.

Q. Which way did he go?

A. He went out the door and went south.

Q. And so that would be turning left?

A. Yes.

Q. And which way did the door open?

A. South.

Q. Goes to the left or goes to the right?

A. It goes—the door goes out towards the south.

Q. So he went out the door around the door and down south somewhere? That's all you could know, right?

A. Yes, but the front of the building is not more than about 12 feet.

Q. You couldn't see anything outside?

A. I didn't see anything outside other than the police officer propping the door open and put both hands on the gun, and (p. 83) didn't say anything. This was a strange incident because when I worked there before, there's never been one police officer come in at a time.

Q. Mrs. Hays, is there a phone in the Will Do Club?

A. Yes.

Q. And where is that located?

A. By the east, by the west door—let's see—by the west door next to the bar, I guess, is how I would describe it.

Q. Is that the same door that Rotramel and Tuttle left the club?

A. Yes.

Q. Did you see William Adam—is there any other phone in the bar?

A. No.

Q. Did you see William Adam Tuttle using that phone that night?

A. Earlier, yes.

Q. What time did you see him use the phone?

A. Probably about 15 minutes before this incident happened.

Q. Are you sure about that?

A. No. I'm not—not to the exact minute, no. But I did see him go to the phone and I asked Vonnie, I said, Who's he calling, and she said—

Q. Did you know who he was calling?

A. We just took it for granted he was calling Rose.

Q. He didn't tell you who he was calling?

A. No.

(p. 84) Q. Okay. After he used the phone, did you speak with him?

A. Yes.

Q. And was he acting normally or different after he used the phone?

A. Not any different than he had the whole evening, no.

Q. Okay. Did you inquire about his behavior?

A. I inquired about it from when I walked in. I asked him how come he didn't speak to me, and then he spoke to me.

Q. Okay. After he used the phone, did you inquire about his behavior?

A. I asked him if everything was all right.

Q. And what did he say?

A. "Yes."

Q. Did he say anything else besides "yes?"

A. Possibly. I just know he told me, yes, everything was all right.

Q. In the deposition you gave on September 16 on page 12, you were asked the question: "Did he say anything to you after the phone call?" You replied: "No, he just came back over, he came back over and he was standing beside me, and I said, 'Bill, are you all right?' and he said, 'Yes, things will be better now.'" Do you recall that?

A. Yes.

Q. Did he say that?

A. Yes. But I just figured, we all just figured he was talking (p. 85) to Rosie on the phone, because I—

Q. Mrs. Hayes, after seeing him six months before in February and seeing him this night, did you develop an opinion about his behavior that night?

Mr. Gassaway: If the Court please, I'll object to the form of that question.

The Court: Sustained.

Mr. Gassaway: Thank you.

Mr. Mahoney: Pardon me?

The Court: Sustained.

Mr. Mahoney: No more questions, Your Honor.

The Court: Redirect?

Redirect Examination

By Mr. Gassaway:

Q. This wrist slitting incident, let's get that clarified for this jury now. He didn't have both wrists slit, did he?

A. No.

Q. One, right?

A. Yes.

Q. And this was in an open bar?

A. Yes.

Q. With people all around?

A. Yes.

Q. And he just stood there?

A. Yes.

(p. 86) Q. Didn't try to conceal it?

A. No.

Q. In fact, he tried to show it to everybody, didn't he?

A. Yes.

Q. And the manager got, and the owner got mad at him, didn't he?

A. Yes.

Q. You weren't concerned about him bleeding to death, were you?

A. No.

Q. Because he wasn't going to, was he?

A. No.

Mr. Mahoney: Objection, Your Honor. She's not qualified to answer that.

The Court: Sustained.

Q. And he got run out of the club?

A. Yes.

Q. And did the owner call the police because he was mad about it?

A. He had to call the police. Yes, he was mad. Yes.

Q. And this man wasn't charged with attempted suicide? It was a crime. You said he was arrested for public drunk, is that right?

A. Yes.

Q. Okay. Now, let's clear up this innuendo about intimidation. Have I or Mr. Hughes or anyone represented intimidated you in any way whatsoever?

(p. 87) A. No.

Q. Let me ask you this about this incident where the police had you down at their own station, and they say to you they think you might be better off if you forget some of this of October 4, 1980; did you consider that intimidation?

A. Yes.

Mr. Gassaway: That's all.

The Court: Any re-cross?

Mr. Gassaway: Can I ask her one more thing from here?

Q. Have you said anything here today that you've hedged or fudged or told what was not true whatsoever?

A. No.

Mr. Gassaway: That's all.

Recross-Examination

By Mr. Mahoney:

Q. Mrs. Hayes, on that February incident, did William Adam Tuttle leave the club of his own power?

A. Yes.

Q. Were his wrists still cut when he left the club?

Mr. Gassaway: If the Court please, I would object to the form of "wrists." She's established that it was a single wrist.

The Court: Sustained. Restate your question, counselor.

(p. 88) Q. Was his wrist cut when he left the club?

A. Yes.

Q. Was it still bleeding when he left the club?

The Court: If you know.

A. I don't know, because I didn't—I mean I didn't watch him walk through the door. I can't—I wasn't watching him when he went out the door. I don't know—I mean I can't—I would say—I don't know how to answer it because I didn't see him going out the door at that time. He went out the door, you know—

Q. Okay. When did the police take you down to the station and tell you to forget your statement?

A. Oh, probably about four to six months ago.

Q. And they took you down to the police station?

A. This was prior to this, this evening when this event happened to Mr. Tuttle, one police officer come to the club.

Q. No.

A. I'm—and prior to this about 15 to 20 police officers came to the club. They demanded everyone put their hands on the bar and not to move. They arrested my husband because—they searched him, there was nothing there. He asked me to pick up his cigarette lighter. He said—he told him he was under arrest for loitering, and he had the keys to the club in his pocket, and they arrested approximately 30 people that night, and they gave me one ticket, just went in to not (p. 89) complaining about anything, or I'd get the other 30 tickets on me, and while I was down there, this conversation come up.

Q. When did you go down to the police station?

Mr. Gassaway: If the Court please, this is repetitious from direct, cross and redirect.

The Court: Overruled.

Q. What did the police have you do down at the police station?

A. What do you mean what'd they do?

Q. Did they ask you what happened in the club?

A. That evening?

Q. Yes.

A. Yes.

Q. And did you tell them what happened in the club?

A. I'd only been there 15 minutes. I come in and the bartender had had too much to drink and—

The Court: Just answer his question. Did you tell them?

A. Yes.

Mr. Mahoney: No more questions, your Honor.

Mr. Gassaway: May this witness be excused?

The Court: You'll be excused. Call your next witness.

Mr. Gassaway: Your Honor, may we approach the bench?

(The following proceedings were had at

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(p. 101) allowed to dry for blood-soaked, and sent to the property room.

Mr. Gassaway: All right. And—may I approach the witness, your Honor?

Q. And I believe you did that pursuant to Section 17.05 of your Oklahoma City Police Department Manual which states that "photographs will be obtained and evidence will be preserved, when applicable." Is that correct? That's what you were doing was preserving evidence at that time, is that correct, sir?

A. Yes.

Q. And you did consider that evidence, did you not?

A. Yes, sir.

Q. And you did take that evidence to the property room as per the requirements of the policy, is that correct, sir?

A. Yes.

Q. And then you didn't have anything else to do with this case, am I correct in assuming that?

A. That's correct.

Mr. Gassaway: That's all.

Mr. Mahoney: No questions.

The Court: You may be excused. Call your next witness, Mr. Gassaway.

Mr. Gassaway: Yes, Your Honor. I would call defendant, Julian Rotramel, by deposition, excerpts of the (p. 102) deposition. I would like to read the questions and Mr. Hughes will read the answers.

The Court: Ladies and gentlemen of the jury, I want to explain that previously a deposition was taken of the defendant in this case, under oath. The plaintiff is allowed to read excerpts from that deposition, and that will be done in the form of Mr. Gassaway asking the questions. Mr. Hughes will read the answers given by the defendant, Officer Rotramel, in response to those questions.

Mr. Gassaway: Your Honor, prior to starting, would you require publishing of the deposition, or—

Mr. Hughes: You want us to announce opening and published, Your Honor?

The Court: Not unless they have an objection, it's not required.

Mr. Mahoney: Pardon me, Your Honor?

The Court: Do we need to formally publish the deposition or do you have, do you have a copy of the deposition?

Mr. Mahoney: I have a copy of the deposition.

The Court: Rick, you might get it in the meantime, if you will. Go ahead. You may proceed, gentlemen. If we run into any problem, my clerk is—

(Whereupon, the following excerpts of the deposition of Julian Rotramel were read (p. 103) into the record:)

Mr. Gassaway: "In the United States District Court for the Western District of Oklahoma, Rose Marie Tuttle, administratrix of the estate of William Adam Tuttle, deceased, Plaintiff vs. The City of Oklahoma City, a Municipal Corporation, and Officer Julian Rotramel, individually and as an employee of the City of Oklahoma City, and the Oklahoma City Police Department, Defendants, Case Number, Civil 81-679-W. Deposition of Julian Rotramel taken on behalf of the Plaintiff on March 24, 1982, in Oklahoma City, Oklahoma, before Elizabeth Omeilia, CSR, CP, and Notary Public for the State of Oklahoma. Appearances for the Plaintiff, Michael Gassaway, Attorney at Law, 1501 Classen Boulevard, Suite 200, for the Defendant, Richard Mahoney, Attorney at Law, 309 Municipal Building, Oklahoma City, Oklahoma.

Julian Rotramel

Being first duly sworn was examined and testified as follows:

Direct Examination

By Mr. Gassaway:

Q. Would you state your full name, please, sir?

A. Julian Rotramel.

Q. Would you spell that for the reporter, please, sir?

A. J-U-L-I-A-N R-O-T-R-A-M-E-L.

(p. 104) Q. Where do you reside, sir?

A. 7901 South Council.

Q. When were you accepted for employment to the Oklahoma City Police Department?

A. I am not sure of the exact date.

Q. Can you give me a month and a year?

A. July of '79.

Q. How were you notified that you were accepted as a candidate for the Oklahoma City Police Department?

A. I believe following the oral interview, they told me in person.

Q. When did you begin your employment?

A. August 3, '79.

Q. Tell me what you did in the first few months as an employee of the City of Oklahoma City for the Police Department.

A. I went to the Police Training Academy.

Q. That is the very first thing you did?

A. Yes.

Q. Where was it located?

A. On North Portland.

Q. When did you begin attending the Academy?

A. August 3.

Q. On the day you were actually employed?

A. Yes.

Q. And do you remember how many other candidates were attending?

(p. 105) A. Approximately 34.

Q. How long did you attend the Academy?

A. I graduated in December.

Q. Four months?

A. I believe so.

Mr. Mahoney: Your Honor, may I ask a question?

The Court: Sure.

(The following conference was had at the bench out of the hearing of the jury:)

Mr. Mahoney: Mr. Rotramel is present. They can read the deposition if he is unavailable or—

The Court: No, they can call—with a party litigant, they can read excerpts from his deposition and use it even though he's present. The rule especially provides for that.

Mr. Gassaway: 32 and 801.

(The following proceedings were had within the hearing of the jury:)

Mr. Gassaway: We're going to pick back up at Page 11, Line 12:

"Q. Did you have any specific training about responding to calls of armed robbery in progress?

A. I don't recall the specifics of it.

G. Do you recall how many hours of training you received, classroom hours?

(p. 106) A. Are we speaking in specific response to an armed robbery?

Q. Yes, sir.

A. No, sir.

Q. Could you even estimate? Did you receive more than one hour of training?

A. I believe so.

Q. Did you receive more than 10 hours of training?

A. I don't think so.

Q. So now we've got it narrowed down between one hour and ten hours. Can I narrow it closer from one hour to five hours of training?

A. Not by me.

Q. You are only comfortable with that range for that specific purpose from one hour to ten hours?

A. To the best of my recollection.

Q. And that's the Academy you attended upon your employment with the Oklahoma City Police Department?

A. Yes, it is.

Q. And this is where you got the training before you were turned out on the street?

A. Yes.

Q. Did you receive any other training other than this Academy before you were turned loose?

A. Before I went to the streets?

(p. 107) Q. Yes.

A. No.

Q. Were you ever taught that there was any difference in how to respond to an armed robbery in progress if you were patrolling by yourself as opposed to patrolling with a partner?

A. I don't recall that.

Q. So to the best of your recollection at this time, the answer is "No?"

A. Yes.

Q. Do you recall anyone training you as to any differences to approach a call of armed robbery in progress when you are riding by yourself or riding with a partner?

A. I don't recall that.

Q. Did you ever receive any training from your employer, the City of Oklahoma City, on how to enter a closed building that you can't see in if you have an armed robbery in progress call there?

A. Not for the call specifically armed robbery in progress.

Q. Did you receive any training in this course or for that matter, any of the other courses, of whether or not to wait for a backup if you were by yourself and you had an armed robbery in progress call, and you arrive at the scene, and you can't see in the building, and the door was shut, and you're the only one there?

(p. 108) A. I don't recall.

Q. So your answer is to the best of your recollection, you received no training?

A. To the best of my recollection.

Q. Did your employer give you any specific training on how to secure a situation or how to enter such a building if you have to enter it by yourself. In other words, to enter the front door, the back, or some other entrance priority wise would you go in first?

A. For this particular call?

Q. An armed robbery in progress?

A. No.

Q. How long had you been working out of school as a police officer on the 4th day of October, 1980, approximately?

A. Approximately 10 months.

Q. What job descriptions did you hold during those ten months?

A. Patrol officer.

Q. What are the duties of a patrol officer?

A. Answer radio calls and patrol your district.

Q. Did you ever work with a partner?

A. Yes, I did.

Q. In your training in your academy, did they give you a copy of the Oklahoma City Police Department Operations Manual?

A. Yes, they did.

Q. Were you told to read it and study it?

(p. 109) A. Yes.

Q. And the manual said—.

Mr. Gassaway: May I quote the particular page, Your Honor?

(The Court indicated affirmatively.)

"and the manual said, 'under all circumstances, bearing in mind the value of human life, an officer will exercise the utmost discretion in the use of his weapon.'" Is that correct?

A. Is that a copy?

Q. I don't have a copy of the entire manual here, no, but do you recall that being accurate?

A. I don't recall that specific statement.

Q. Based upon your experience, would you consider that a fair statement?

A. A fair statement?

Q. Yes.

A. Of the manual?

Q. A correct statement of the use of a weapon that you should exercise the utmost discretion in the use of your weapon?

A. I believe so.

Q. Should a police officer to the best of his ability try to make an arrest or an apprehension without violence?

A. Yes.

Q. Based upon your experience?

(p. 110) A. Yes.

Q. Would the use of a firearm by an officer be justified if an apprehension or arrest can reasonably be made without violence?

A. No.

Q. It's not justified, is it?

A. No.

Q. Is the use of a firearm justified to fire a warning shot?

A. No.

Q. Is the use of a firearm justified to apprehend a misdemeanor suspect or a person who has committed a misdemeanor in your presence?

A. I can't think of any circumstances.

Q. So your answer is no?

A. Yes.

Q. Is that correct?

A. Yes.

Q. Is the use of a firearm justified when the use of deadly force constitutes a greater threat to human lives than allowing a criminal to escape?

A. Yes.

Q. It's not justified, is it?

A. No.

Q. Northwest Tenth and Portland is a pretty busy intersection. Would that be a fair statement?

(p. 111) A. Pretty busy.

Q. Would you consider the use of a firearm a last resort of any fleeing suspect?

A. Yes.

Q. You can't shoot a man that's running from you if you have not seen an offensive weapon, can you?

A. No.

Q. An offensive weapon could be a gun, a knife, or perhaps a multitude of other things that can cause great bodily injury or death, is that correct?

A. Yes.

Q. Did you see an offensive weapon in the attempted apprehension of William Adam Tuttle on the 4th day of October, 1980, at a location at approximately Northwest Tenth and Portland outside the Will Do Club?

A. No.

Q. And you shot William Adam Tuttle that night, didn't you?

A. Yes, I did.

Q. In your capacity as a police officer?

A. Yes.

Q. Okay. I guess we ought to start from the first then. What were you doing on the night of October 4,

1980, when you received a call of an armed robbery in progress at the Will Do Club?

A. I was on patrol.

(p. 112) Q. By yourself?

A. Yes, I was.

Q. What did the dispatcher tell you if you recall?

A. "Armed robbery in progress, Northwest Tenth and Portland, the Will Do Club, suspect, white male, brown hair, and glasses."

Q. Any physical description of size?

A. I don't recall it now.

Q. So to the best of your recollection, there was not a physical description as to size?

A. To the best of my recollection now.

Q. And your report, your report doesn't indicate any physical dimensions of any sort, does it?

A. No, it doesn't.

Q. Did you at that time make any investigation as to any alternative entrances or exits of the building?

A. No, I did not.

Q. Was there any reason why you didn't?

A. None.

Q. Were there any windows that you could see in?

A. None that I could see, no.

Q. When you got there, did you park your vehicle directly in front of the west door?

A. Yes."

Mr. Gassaway: May I approach the witness, Your Honor?

"Q. The west door. So there was no other vehicle impeding your ability to park in front of the door?

A. No.

Q. Were there any other cars in the parking lot?

A. I believe there were.

Q. Can you give me your best estimate as to the number of cars?

A. One or two.

Q. So it did not appear to be crowded?

A. No.

Q. Did you call for a backup before you went in?

A. No.

Q. Didn't think about waiting for a backup before you went in? Were you trained to wait for a backup before you went in?

A. Not specifically.

Q. Well, you didn't have any specific training on when to wait for a backup and what not to do, did you?

A. No specific training, no.

Q. Well, they could have given you some courses on handling this specific situation, could they not, entering a blind building?

A. Yeah.

Q. You didn't have any training in that, did you?

A. I don't recall it now.

Q. And you have already said you didn't have any training on when to wait for a backup and when to proceed in a blind building with an armed robbery in progress, didn't you?

A. I believe that's right.

Q. And they could have given you that training, couldn't they?

A. They could have.

Q. And you didn't receive it, did you?

A. To the best of my recollection, no.

Q. Based on those two statements now, can you tell me under oath that you were adequately trained to handle that specific situation?

A. No.

Q. They didn't train you to look for a back door, did they, so as to be able to slip in without being easily noticed?

A. I don't recall that.

Q. In any event you went in without your gun drawn?

A. That's true.

Q. You didn't see any weapons?

A. No.

Q What did you do next?

A. As soon as I came in the door, I stopped the first person that came towards me.

(p. 115) Q. Did that happen to be the victim in this case?

A. Yes, it did.

Q. You didn't advise him that he was under arrest or anything?

A. No, I did not."

Mr. Gassaway: May I approach the witness again, Your Honor?

The Court: Yes.

"Q. Item No. 1 (pointing to exhibit). Did you smell any alcohol on this suspect?

A. No.

Q. And this suspect turned out to be William Adam Tuttle, is that correct?

A. That's correct.

Q. So you did not detect the odor of alcohol?

A. I did not.

Q. Did he talk to you?

A. He said one statement, one word.

Q. What was that?

A. "Why."

Q. Did you give him a reason?

A. I said, "I have a call. Stay inside."

Q. Other than saying, "I have a call, stay inside," you gave him no other reason?

A. That was it.

(p. 116) Q. Did he have a drink in his hand?

A. When I first came in, yes.

Q. Did you observe any armed robbery in progress at that point?

A. No, I did not.

Q. Did he go out the west door?

A. Same door I came in.

Q. That's the west door. You hadn't seen any weapon on this man, had you?

A. No, I hadn't.

Q. Did there appear to be anybody scared at the time, the bartender or the customers?

A. No.

Q. Did there appear to be anything unusual going on inside?

A. No.

Q. And this man you said you observed had a drink when you came in?

A. Yes.

Q. Would it strike you as unusual that an armed robber would be standing there with a drink? More than likely if he were an armed robber, he would be standing there either with the fruits of the robbery or with an of-

fensive weapon, armed and dangerous and trying to rob somebody. Isn't that correct?

A. That's true.

Q. And you wouldn't consider a drink an offensive weapon, would you?

(p. 117) A. No.

Q. He hadn't acted like any kind of tough guy inside the bar, had he?

A. No.

Q. Where did you first observe him when you looked outside?

A. At the south end of the building."

Mr. Gassaway: May I approach the witness, Your Honor?

The Court: Surely.

"Q. West door south end of the building. Did you hide behind your car or did you have anything to protect your body?

A. Nothing.

Q. Were you standing out in the open on the sidewalk?

A. Yes.

Q. With your gun pulled?

A. Yes.

Q. Pointed at the man?

A. Yes.

Q. Two hands or one hand?

A. I believe two.

Q. But you drew down on him with your weapon?

A. As I cleared the door, yes.

Q. 357?

A. Yes.

(p. 118) Q. What did he appear to be doing, running?

A. He was crouched down.

Q. Crouched down behind what?

A. Behind nothing.

Q. He was out in the open?

A. True.

Q. Was he crouched down such as one would squat like a catcher?

A. I don't recall.

Q. Was he crouched down like he was bending over to touch his toes?

A. I don't recall the particulars.

Q. Was he facing you or was he facing away from you?

A. He was facing away from me.

Q. How high were you holding your weapon?

A. About shoulder height.

Q. Right where your arms come straight out, would that be a fair statement?

A. Fair.

Q. Were you watching for a weapon?

A. I was.

Q. Did you ever see a weapon?

A. I did not.

Q. What happened next? Did he come up?

A. As I hollered, he came up.

(p. 119) Q. Did he come up looking towards you or looking away from you?

A. He looked towards me.

Q. Did he turn toward you or did he just look over his shoulder?

A. He started to turn.

Q. Is that when you fired your shot?

A. That is.

Q. Can you tell me how it turns out he was shot in the back?

A. He did not complete his turn."

Mr. Gassaway: May I approach the witness, Your Honor?

Q. The bullet entry hole (indicating on picture shown to jury.) Had he committed any felonies?

A. None.

Q. Why didn't you go chase him?

A. I felt like he was the armed robber.

Q. And that was a judgment error. He wasn't, was he?

A. He had not committed a robbery.

Q. Did you attempt to run after him and tackle him?

A. No.

Q. Did you attempt to get in your car and follow him?

A. As I came out the door ?

Q. Any time?

(p. 120) A. No.

Q. Would those have been means of apprehension?

A. They could have been. Yes."

Mr. Gassaway: May I approach the witness, Your Honor?

"Q. If necessary the means would be essential as a last resort. The use of a firearm by an officer is not justified if apprehension and/or arrest can reasonably be made without violence. Did you have any courses on how to handle that situation that you were in at that time?

A. Not specifically.

Q. Do you think you could have had at that time used a course in that?

A. If the time would have permitted, yes.

Q. Perhaps they didn't quite train you well enough in that situation, did they?

A. Perhaps.

Q. Now, Mr. Tuttle didn't ever actually pull a gun on you, did he?

A. No, he did not.

Q. And he never actually made any physical threats. I'm going to kill you, you dirty cop, or anything like that?

A. No, he did not."

(p. 121) Mr. Gassaway: May I approach the witness, Your Honor?

"Q. (Pointing to exhibits) 'The officer is justified in using his firearm only in the defense of life and instances where a suspect is armed.' Did you advise him he was under arrest?

A. No.

Q. (Indicating on exhibit) 'The arresting officer's responsibility is to inform the suspect that he or she is under arrest and the nature of charges.' Did he ever make any actual, physical resistance?

A. Other than just trying to leave the bar while I held him, no.

Q. You didn't have any real grounds that this man was a fugitive from justice or anything like that, did you?

A. No.

Q. Would it be fair to say that you were acting on suspicion in attempting to apprehend him?

A. Yes.

Q. But no felony, in fact, had been committed?

A. Not in my presence.

Q. Did you have an arrest warrant for him?

A. No.

Q. And he hadn't committed a felony or a misdemeanor in your presence, had he?

(p. 122) A. He hadn't committed a felony in my presence.

Q. Well, what misdemeanor did he commit in your presence?

A. Refusal to obey a lawful command by a police officer.

Q. What was that lawful command?

A. To stay inside the club."

Mr. Gassaway: May I approach the witness, Your Honor?

"Q. (Indicating the exhibit) 'The use of firearms is not justified to apprehend a misdemeanor.' No one had pointed a finger at Tuttle and said he was the armed robber, did they?

A. No.

Q. And he died, didn't he?

A. Yes, he did.

Q. After you discharged your weapon, what was the next thing that occurred?

A. I believe that Tuttle walked on south and Officer —

Q. Lennox?

A. —Riley Lennox came running up.

Q. Were you prepared to fire another shot at this time?

A. I was. My gun was still out.

(p. 123) Q. Did you have any intent to fire another shot?

A. Until I could see his hands, I would have.

Q. Were Tuttle's pants tucked inside his boots or were they outside his boots?

A. I don't recall.

Q. Did you ever see him pull his pant leg up so he could get into his boots?

A. Not that I recall.

Q. Did the shot knock him off his feet?

A. No.

Q. In your training did they give you any type of factors to consider in whether to try to knock the man down with a bullet or just cripple him?

A. No.

Q. Did you ever think about perhaps just shooting him. Trying to shoot him in the arm or leg?

A. That night?

Q. Yes.

A. No, I did not.

Q. So perhaps you weren't as well trained by your employer as you should have been in that specific situation. Is that a fair statement?

A. Yes.

Q. And if you would have been adequately trained in that specific situation, perhaps Mr. Tuttle would be (p. 124) alive and you wouldn't have been answering these questions, is that correct?

A. That's possible.

Q. The man wasn't dead, was he?

A. No, he wasn't.

Q. He was fairly active, wasn't he, trying to get up and sit down, flopping around and yelling, after he had been shot?

A. I don't recall. I believe he was active, though, and I don't recall who searched him or what happened there.

Q. Would it be normal police procedure if one were to think that a suspect were armed and, in fact, that was the reason one had shot the suspect because he thought he was armed, to search him and disarm him or have someone search him and disarm him?

A. Probably.

Q. Absolutely."

Mr. Gassaway: May I approach this witness, Your Honor?

A. Well, I wouldn't stand around if I thought he had a chance to pull a weapon on me.

Q. (Indicating on Exhibit) 'Male officer's responsibility, thoroughly searches male suspects for weapons.'

You wouldn't let an arrestee, a suspect, sit there even if shot if you (p. 125) thought he had a weapon without taking it away from him, would you?

A. Correct.

Q. Did you search him?

A. I did not.

Q. Did Lennox secure the victim?

A. Yes.

Q. He stayed with the victim to the best of your knowledge?

A. To the best of my knowledge he stayed with him as the other officers were arriving.

Q. And you made Lennox aware that you thought he had a weapon?

A. Yes, I did. When he first walked up, I did.

Q. What other types of apprehension were available? How have you been taught to apprehend somebody running from you?

A. I could have clobbered him with my flashlight or something, anything.

Q. What did your employer teach you on how to apprehend somebody running from you? Did you have any courses in that?

A. To specifically chase down someone running?

Q. Yes.

A. Not that I recall about that specific—

Q. So you weren't given any instruction on how to apprehend a fleeing suspect?

A. Not specifically.

Q. Would that indicate to you that perhaps that portion of your (p. 126) training was inadequate?

A. Yes.

Q. Looking back on this in retrospect, if you would have had training or adequate training in all these specific areas that you and I have discussed here today, do you feel that man would have been shot that night?

A. Anything is possible.

Q. Do you think that it would have been more probable that he would not have been shot if you would have had that adequate training?

A. It's possible.

Q. So your answer is yes?

A. Yes."

Mr. Gassaway: That's all, Your Honor.

The Court: Let's take a recess at this point. Ladies and Gentlemen of the Jury—Is 1:15 agreeable with you gentlemen? (Affirmative response) We'll resume at 1:15 and I'll ask you to assemble in the Jury Assembly Room at 1:10, and I'll remind you of my previous admonition not to discuss this case. Everyone please stand. Court is in recess.

(Noon Recess Taken)

(p. 127) The Court: Be seated, please. I think we best wait for defense counsel.

Mr. Hughes: It would go smoother. Judge, we have a couple more questions that we didn't get to.

Mr. Gassaway: Now, I finished reading from the deposition. I would also like to read answers to interrogatories filed by the defendant, Rotramel. This is in the same case. It would be answers, sworn under oath. The answers to interrogatories that we filed, asking Julian Rotramel to answer under oath. They were filed December 28, 1981. They were answered February 26, 1982.

"Interrogatory No. 5. State what public offense was being committed that required the defendant Rotramel to use deadly force during the incident complained of.

Answer: Failure to obey a police officer by fleeing while said police officer was investigating an armed robbery."

In addition, interrogatories were filed asking Julian Rotramel to answer under oath certain questions. The interrogatories were filed November 6, 1981. The answer was filed February 26.

"Interrogatory No. 2. Do you allege the deceased committed any crime on the night you shot him? If so, state all crimes and when they (p. 128) occurred.

Answer: Failure to obey the command from a police officer while in the discharge of his duty."

We again point out that "use of a firearm is not justified to apprehend a misdemeanor." With that, your Honor, I would call Officer Riley Lennox through agreement, by deposition.

The Court: Do you have his deposition?

Mr. Mahoney: Your Honor, Could I have some excerpts from the Rotramel deposition read into the record at this time?

The Court: Yes, you may.

Mr. Hughes: You want me to just read the answers?

Mr. Mahoney: I'll just have —

The Court: You will just read the questions and Mr. Hughes will continue to read the answers, if that's agreeable, Counselor?

Mr. Mahoney: Page 52, Mr. Hughes. These are parts that were partially left out.

The Court: Sure. I'll explain it. Ladies and gentlemen of the jury, you will recall previously that excerpts from Officer Rotramel's deposition were read just prior to our luncheon break. Defense counsel now has the (p. 129) opportunity, if he wishes to do so, to read additional parts or excerpts which they are doing. What page and line number, Counselor?

Mr. Mahoney: Page 52, your Honor.

(The following proceedings were had at the bench out of the hearing of the jury:)

Mr. Mahoney: These first parts where the Officer entered the Club were not in proper context.

Mr. Gassaway: If the Court please I'll — they said they would read excerpts.

The Court: Yes. Just read the excerpts. Why can't he just answer the question immediately preceding?

Mr. Mahoney: I'll just read other parts.

(The following excerpts were read from the deposing of the jury:)

The Court: Page and line number, if you will, Mr. Mahoney.

Mr. Mahoney: Page 51, line 25, continuing over to page 52, line 19.

The Court: Go ahead.

(The following excerpts were read from the deposition of Julian Rotramel:)

"Q. You approached the bartender, didn't you?

A. No, I stayed by the door.

Q. You motioned the bartender to come to you?

(p. 130) A. Not yet.

Q. What did you do next?

A. As soon as I came in the door, I stopped the first person that came towards me.

Q. Did that happen to be the victim in this case?

A. Yes, it did.

Q. Was the victim attempting to leave?

A. Yes, he was.

Q. How did you detain him?

A. I put my left hand on him.

Q. Now, your flashlight was in your left hand, too, was it not?

A. Yes. I put my left hand on his chest and asked him to stay in the Club.

Q. Did he obey your command?

A. He continued resisting against my hand.

Q. Was he fighting you?

A. No, just pushing, resisting."

Mr. Mahoney: Page 53, line 22, to page 54, line 1.

"Q. Did he talk to you?

A. He said one statement, one word.

Q. Which was what?

A. "Why?"

Q. Did you give him a reason?

(p. 131) A. I said, "I have a call. Stay inside."

Mr. Mahoney: Page 56, line 5, to page 57, line 2.

"Q. What did you say to the bartender?

A. Have you reported a robbery? Did you call?

Q. And she said there wasn't any robbery, didn't she?

Mr. Gassaway: We object to the leading and suggestive, if the Court please. This is his witness.

The Court: All right. Overruled.

"A. And she said, "Robbery," and I asked her — the suspect broke from my hand.

Q. So you're telling me that she did not deny that there was a robbery in progress prior to him breaking?

A. She didn't have time to say anything.

Q. And the suspect broke from you. Were you physically touching him at the time he left?

A. When I asked her the question, he broke from me.

Q. Were you physically touching him at the time?

A. I was touching him.

Q. Were you grasping him loosely or firmly?

A. I was holding my flashlight and him.

Q. Were you holding him by the arm?

A. By the shirt.

Q. By the front of the shirt where it buttons up?

A. Yeah, that's right.

Q. Did he go out the west door?

(p. 132) A. The same door I came in.

Q. What did you do?

A. I hollered immediately as soon as he broke through the door to halt.

Q. Did you holler that loudly?

A. Yes.

Q. Loud enough that others in the bar could hear it?"

Mr. Hughes: Let's see. That wasn't where he left off.

Mr. Mahoney: Excuse me.

"A. I suppose. I wasn't facing them."

Mr. Mahoney: Okay. Page 59, line 15 through 25:

"Q. At what point did you draw your weapon?

A. As I came out the door or after I cleared the door.

Q. Why?

A. The suspect, as I saw him running, or as I cleared the door, was a potential felon.

Q. Why?

A. He matched the description of the armed robber.

Q. You didn't have a physical description, did you?

A. Just what is there in the report?

Q. Brown hair and glasses?

A. Yes."

Mr. Mahoney: Page 60, line 15 through 17.

(p. 133) "Q. He hadn't made any physical threats to you at that time, had he?

A. He had made movements towards his feet where I felt that he had a concealed weapon."

Mr. Mahoney: Page 63.

Mr. Gassaway: Wait. I thought we were going to read 16 through 22. Have you changed your mind?

Mr. Mahoney: I believe I asked for 14 through 17. Am I mistaken?

The Court: I believe that's right. Go ahead.

Mr. Mahoney: I'm mistaken. Page 63, lines 18 through 20.

"Q. Where did you first observe him when you looked outside?

A. At the south end of the building."

Mr. Mahoney: Page 64, lines 1 and 2.

"Q. What did you do when you spotted him?

A. Hollered once again to, "halt!".

Mr. Mahoney: Page 86, line 6 through 16.

"Q. What other means of apprehending him were available other than shooting him?"

Mr. Hughes: 16. What was that?

Mr. Mahoney: Page 86, line 6 through 16.

Mr. Hughes: Okay.

"A. Without endangering myself outside the club?

(p. 134) Q. Just period.

A. None.

Q. There was no other way to apprehend that man other than to shoot him?

A. Outside the club, there wasn't.

Q. You either had to let him go or to shoot him?

A. Apprehension wasn't the question. I felt like I was in danger."

Mr. Mahoney: Thank you, Your Honor.

Mr. Gassaway: May I proceed, Your Honor?

The Court: Sure. Let the record reflect that I have published, opened both depositions of Officer Rotramel.

And I, also, have now the deposition of Riley Lennox. Go ahead, Mr. Gassaway.

Mr. Gassaway: Okay. At this time, Your Honor, I would like to move to introduce the applicable city ordinance, City of Oklahoma City Ordinance, Section 21-27, which deals with the interference with official process, the allegation that they said that the misdemeanor was committed.

The Court: Do you have any objection, Mr. Mahoney?

Mr. Mahoney: No objection.

The Court: Be admitted.

Mr. Gassaway: Move to admit Plaintiff's 35. May I read a portion to the jury, Your Honor?

• • •

(p. 534) Mr. Mahoney: We'll call the defendant, Julian Rotramel.

The Court: Have you been sworn, please?

A. Yes, Your Honor.

The Court: Be seated and I'll remind you you're still under the same oath as previously administered.

A. Yes, sir.

The Court: Swing that microphone further out if you need so you can speak directly into it, please.

JULIAN ROTRAMEL

Called as a witness, having first been duly sworn, testified as follows:

Direct Examination

By Mr. Mahoney:

Q. Would you state your name, please?

A. Julian Rotramel.

Q. And your occupation?

(p. 535) A. I work for an oil company, oil production.

Q. Did you ever work as a police officer with the police department?

A. Yes, I did.

Q. And when did you work for them?

A. From August 3, '79, to April of '81.

Q. All right. Were you working at the police department on October 4, 1980?

A. Yes, sir.

Q. And what were your duties at that time?

A. I was a patrol officer.

Q. All right. And were you riding by yourself or with a partner?

A. By myself.

Q. Was this in a police cruiser?

A. Yes, sir.

Q. Where were you riding?

A. The boundaries of my district were from Broadway east was the eastern boundary, and west to Portland, and from Northwest 23rd to Northwest 50th.

Q. Do you recall the events of October 4, 1980?

A. Yes, sir.

Q. Do you recall receiving an armed robbery call?

A. Yes, sir.

Q. In progress?

(p. 536) A. Yes, sir.

Q. Where were you when you received that call?

A. To the best of my recollection approximately Northwest 19th and Portland.

Q. All right. Did you respond to that call?

A. Yes.

Q. How long did it take you to respond to it?

A. Just however long it took for me to get a break in traffic and turn around, and drive back down to Tenth and Portland.

Q. Do you have sort of an estimation of how long in terms of minutes how long it was?

A. Less than two minutes.

Q. All right. What did you do when you arrived?

A. I pulled to the front or the west door of the club, and looked through the parking lot and started towards the door.

Q. Did you see anything suspicious in the parking lot?

A. No.

Q. Were there other cars parked in the lot?

A. I believe there were a few.

Q. Were there any other people outside?

A. Not that I saw.

Q. Did you enter the club?

A. Yes, sir.

Q. Did you wait for a backup before you entered the club?

A. No, sir.

(p. 537) Q. Why didn't you wait for a backup?

A. The only other car in my district was downtown. I felt like that it would be repetitious in that the call had gone out over all the channels and anyone that could help that was available was already on the way.

Q. All right. So you entered the club by yourself?

A. Yes, sir.

Q. What did you see when you entered the club?

A. Approximately 10 people just standing in the club and one man standing at the bar who immediately looked towards me and started walking towards me.

Q. All right. Did he—did you have a description?

A. Yes, sir.

Q. Do you recall the description?

A. White male, brown hair and glasses.

Q. What did the man look like who approached you?

A. He was about 5'6 or 5'7, and weighed approximately 140 or 150 pounds. He had glasses and brown hair.

Q. Did you motion for him to approach you?

A. No, sir.

Q. Did he have anything in his hand at that time?

A. No, sir.

Q. Did he have a drink in his hand?

A. Not when he started towards me.

Q. All right. Did you realize that he matched the description (p. 538) that you had?

A. Yes, sir. I did.

Q. When did you realize that?

A. As soon as he cleared the bar and started towards me.

Q. How far away was he when he started walking towards you?

A. I can't say exactly. He was half the width of the bar away from me.

Q. All right. Can you use some object in this room as how far away he was?

A. Approximately the corner of that table right there (indicating).

Q. All right. Did you stop him?

A. When he got next to me, I did.

Q. And how did you do that?

A. I reached out and took his arm and asked him to stay inside the club.

Q. And what did he say?

A. He attempted to walk on past me and I believe I said, "Stay put," and he said "Why?"

Q. All right. Did you tell him why you wanted him to stay inside?

A. I believe I said, "I've had a call. Stay inside."

Q. Did he say anything to that?

A. No, sir.

Q. Did he stay still?

(p. 539) A. Yes, sir.

Q. Did he cooperate with you when you stopped him?

A. He continued to trying to leave, but I had hold of him with my left hand by the front of his shirt by this time, and he couldn't, couldn't leave.

Q. Was he squirming or struggling?

A. Yes, sir. He was pushing back towards my hand, and then alternately pulling away from my hand.

Q. In a fast motion or slow motion?

A. Relatively slow.

Q. All right. Did you inquire of anyone about an armed robbery call?

A. Yes. I raised my voice to the barmaid and asked her to come over.

Q. And what was she doing?

A. She looked at me and walked rather quickly to the far end of the bar away from me.

Q. Okay. Now, Officer Rotramel, was that Vonnie Hinds?

A. I can't say.

Q. All right. So did you ask her what happened, if there was an armed robbery in progress?

A. Not right away. She didn't come over there.

Q. What did you say to her?

A. Pardon me?

Q. What did you say to the bartender?

(p. 540) A. Well, when she did get there, I asked if she had called an armed robbery.

Q. Did she respond to you?

A. She said, "robbery."

Q. Did she tell you that everything was fine?

A. I can't say. At that same moment the deceased broke and ran. When I asked her if there had been a robbery, he pulled from my hand.

Q. All right. While you had the decedent in your hand, did he make any movements in the club?

A. Yes, sir. After I first detained him, he immediately bent over.

Q. And what did you do?

A. I straightened him back up with my left hand.

Q. How far did he bend over?

A. Almost touching his feet.

Q. All right. Did he do that once?

A. He did it twice inside the club, the second time being when I took my hand away from him for a moment to use my flashlight to get the barmaid's attention.

Q. How were you using your flashlight to get her attention?

A. Well, I shined it on her because she wasn't—she was still standing at the far end of the bar and wouldn't come down there in response to my asking her to.

Q. When you entered the club, she walked away from you?

(p. 541) A. Yes, sir.

Q. All right. When Tuttle broke away from you, did you say anything to him?

A. Yes, sir.

Q. What did you say?

A. I said to halt.

Q. Is that the word you used, "Halt?"

A. I said, "Halt."

Q. How far away from him were you when you said that?

A. Less than four feet.

Q. All right. Did you say it in a tone of voice that you thought he could hear it?

A. Yes, sir.

Q. Which direction were you facing when you said, "Halt?"

A. I was facing—

Q. Go ahead and use the diagram if that will help you.

A. I was facing northwest. I was facing the door more or less.

Q. Did Tuttle halt?

A. No, sir, he didn't.

Q. What did he do?

A. He cleared the door and the spring shut the door back in my face.

Q. Did you follow him?

A. Yes, sir. I then pushed the door open and stepped on outside.

(p. 542) Q. Did you have your weapon out at that time?

A. I'm not sure.

Q. Do you remember when you pulled your weapon out?

A. After I cleared the door and the door shut back, and as the door shut, then I could see him, and that's when I pulled my weapon.

Q. All right. Where was he when you saw him outside the club?

A. He was on down past the—he was approximately right here (indicating on map).

Q. Where the "X" is?

A. Yes, sir.

Q. All right. What was he doing there?

A. He was in a crouched position.

Q. What did it look to you like he was doing?

A. I felt like he was, he had been inside of his boot, and that's where his hands were when I, when the door shut.

Q. Did you see his hands?

A. No, sir.

Q. Did you see what he was reaching for?

A. No, sir.

Q. Did you think that he was stumbling?

A. No, sir.

Mr. Hughes: Excuse me, Your Honor. I don't mind a little bit of leading, but—

The Court: Yes, don't lead the witness, (p. 543) counselor.

Q. All right. Did you have an opinion of what he was doing in that position?

A. Yes, sir. I felt certain that he had recovered a weapon from his boot.

Q. All right. Why did you think that, Officer Rotramel?

A. Because he had matched the description of the armed robber, and had gone for his boot twice inside the club, and had had sufficient time to recover the gun from his boot outside the club.

Q. What was the lighting like outside the club?

A. It was fairly dark.

Q. All right. Did you say anything to him when you saw him in that position?

A. Yes, sir. I once again said, "Halt."

Q. All right. What did Tuttle do when you told him to halt the second time?

A. He looked back towards me and jumped.

Q. All right. How do you mean "jumped?" Did he jump straight up?

A. Yes.

Q. What did you do?

A. That's when I fired.

Q. Did William Adam Tuttle ever turn around?

A. No, he did not.

(p. 544) Q. He had his back to you?

A. Yes.

Q. Did you say stop loud enough that he could hear you when he was in that position?

A. Yes, sir.

Q. Did you ever come in contact with this man at any time before this night?

A. No, sir.

Q. Have you come into contact with the plaintiff or anyone associated with him after that date?

A. To the best of my knowledge, no.

Q. Officer Rotramel, why did you shoot William Adam Tuttle?

A. I felt like that he had recovered a weapon and was preparing to use it on me in order to make his escape.

Q. Did you feel your life was in danger?

A. Yes sir, I did.

Q. And you shot him because your life was in danger, is that right?

Mr. Hughes: Excuse me, Your Honor. I object.

The Court: Let him testify.

Mr. Mahoney: That's all I have at this time.

The Court: Mr. Hughes.

Cross-Examination

By Mr. Hughes:

Q. You're no longer a police officer, are you Mr. Rotramel?

(p. 545) A. No, sir, I'm not.

Q. But you did — you were trained in law, is that right?

A. Yes, sir.

Q. Were you trained in terms of the law that there's a difference between suspicion and probable cause?

A. I don't recall that right now, sir.

Q. Okay. You were trained, too, in the policies and procedures of the Oklahoma City Police Department, weren't you, sir?

A. Yes, sir.

Q. And we've been through those. You've been here in court, and paragraph 9.03 and 17.05, you were trained in those, weren't you, sir?

A. Yes, sir.

Q. And you knew about them on October 4th of 1980?

A. Yes, sir.

Q. And I believe you presented yourself for deposition on the 24th day of March 1982, do you recall that?

A. I recall the deposition around that time, yes, sir.

Q. And you recall Mr. Gassaway, who sits here, was present on that day?

A. Yes, sir.

Q. And he asked you some questions?

A. Yes, sir.

Q. Mr. Mahoney, your lawyer, was present on that day, too; do you recall that?

(p. 546). A. Yes, sir.

Q. And on that day you took an oath to tell the truth?

A. Yes.

Q. And did you tell the truth to the best of your ability?

A. Yes, sir.

Q. And you heard here in this courtroom that deposition or substantial portions of that deposition read, is that right?

A. Of my deposition?

Q. Of your deposition?

A. Yes, sir.

Q. And the testimony you have in that deposition was accurate to the best of your ability, wasn't it, sir?

A. Yes, sir.

Q. And do you recall in that deposition that you were asked about specific training that you had, particularly in the investigation, preparation and investigation of armed robbery cases?

A. I believe so, yes.

Q. I'll show you, sir, what's been introduced into evidence and discussed at some length as Plaintiffs' Exhibit B, which appears to be the curriculum for the 84th Oklahoma City Police Academy. Are you familiar with that document?

A. Yes, sir.

Q. And that, sir, is the document that you were presented with, or a copy of it, that you were presented with during your (p. 547) deposition, is that right?

A. It appears to be.

Q. And you were asked at that time to circle all of the courses that you had at that Academy relating to the investigation of armed robbery, do you remember that?

A. Yes, sir.

Mr. Hughes: May I approach the witness,

Mr. Mahoney: May we approach the bench?

(The following proceedings were had at the bench out of the hearing of the jury:)

Mr. Mahoney: Deposition's—I didn't bring any of this stuff in. I think this is outside the scope.

The Court: Why is this not cumulative, counselor.

Mr. Hughes: This is what he said his training was, Your Honor.

The Court: I understand that, but they haven't denied that in any way on his direct examination.

Mr. Hughes: They denied it through other witnesses, Your Honor.

The Court: In other words, you're not introducing it but to impeach other testimony?

Mr. Mahoney: It's direct —

The Court: I'll allow you some leeway, but don't spend too much time.

(p. 548) Mr. Hughes: I won't take very long.

(The following proceedings were had within the hearing of the jury:)

Q. You circled three courses that related to the investigation of armed robbery in the deposition. Do you recall that?

A. I recall circling some. I don't remember how many exactly.

Q. Well, the first I believe you'll find in the fourth week.

A. Yes.

Q. Do you find that there?

A. Yes, sir.

Q. At one o'clock, questions and answers, when to shoot/not shoot, is that right?

A. Yes, sir.

Q. And you said that in that time they showed you a film, "Shoot! Don't Shoot!", maybe more than one film, but that's what they were basically about?

A. Yes.

Q. And you remember testifying in your deposition that the part that related to the investigation of armed robbery was about five minutes?

A. No, sir. I don't recall that exactly.

Mr. Hughes: Just to refresh his recollection, Your Honor.

Q. You said five minutes, is that right, sir?

A. That's what I said.

(p. 549) Q. The next instance that you testified about where you were given training in armed robbery was the

tenth week at one o'clock on Friday, October 13th, hostage negotiations and tactical operations.

A. Yes, sir.

Q. At that time you said you saw a film, approximately five minutes of which was addressed to an armed robbery in progress; do you recall that?

A. I believe that's right.

Q. And the last course you said you had in the investigations of armed robbery in progress was in the thirteenth week, Tuesday, October 30th, at three o'clock.

A. Yes, sir.

Q. That is—it's item "E" there. There were five courses taught between three o'clock and 4:50 on that day, weren't there?

A. Yes, sir.

Q. Death and emergency messages, house welfare checks, locked out of house, wanted/stolen vehicle, and robbery scene response; is that right?

A. According to this schedule, that's what it says.

Q. That's what is typed on there, isn't it?

A. Yes, sir.

Q. And you said that that was about—20 minutes of that class was devoted to robbery investigation in your deposition, do (p. 550) you recall?

A. To the best of my recollection, yes.

Q. And those were all the courses that you said you had on robbery scene investigation; isn't that right, sir?

A. Yes, sir, going by this schedule.

Q. Yes, sir. Now, to the best of your recollection, you didn't have any training in calling for a backup, did you?

A. Could you restate that, please?

Q. You didn't have—you don't have—you didn't have any training about calling for a backup?

A. As if when to call and when not to call for one?

Q. Yes, sir.

A. I don't recall the specifics at this time.

Q. And you weren't specifically trained to wait for a backup before you went in, were you?

A. Went in?

Q. To a building such as the Will Do Club at Northwest Tenth and Portland?

A. Not specifically.

Q. And you didn't receive any training on how to enter a blind building, did you?

A. I don't recall, now.

Q. So based on the fact that you didn't receive any training in calling for a backup or entering a blind building, you can't tell us under oath that you were adequately trained to handle (p. 551) that specific situation at the Will Do Club on October 4, 1980, can you, sir?

A. The specific situation as it turned out?

Q. Yes, sir.

A. I wasn't trained for that specific situation.

Q. Well, in the deposition at least—and I'll ask you if your opinion has changed since then—

Mr. Brummitt: Your Honor, we'd object to this, again, the term "changed his—

The Court: Overruled. I'll allow him some leeway. Go ahead.

Q. You testified that you weren't as well trained by your employer as you should have been in that specific situation?

A. Is that the word I said?

Q. Yes, sir.

A. No, my opinion has not changed.

Q. And if you would have been adequately trained in that specific situation, perhaps Mr. Tuttle would be alive and you wouldn't be here answering these questions today?

A. And I said, "Anything is possible."

Q. Yes, sir.

A. That's true.

Q. And as you worked for the Oklahoma City Police Department, you actually only worked in the North Division, didn't you?

A. Yes, sir.

(p. 552) Q. You never—there are two other divisions, there's central and south, is that right?

A. That's correct.

Q. And you never worked central or south division, did you, sir?

A. No.

Q. And you know from your training and also from being in court that there was—a normal police procedure is to have a crime scene sketch done, and that there was, in fact, one done at the Will Do Club on the 4th of October 1980, don't you, sir?

A. Do I know that there was a scene sketch made?

Q. Yes, sir.

A. I believe it's been introduced.

Q. Yes. And that's normal police procedure, isn't it?

A. On a major crime scene, I believe it is.

Q. Pardon me?

A. On a major crime scene.

Q. Yes, sir. Would you—you said that you—I believe you testified that you pulled your car up adjacent to the front door; do you remember that?

A. I pulled—yes.

Q. Could you draw in here where your car was on that night?

A. This arrow (indicating) will be the front of the car.

Q. Thank you. I'll show you, sir, what's been marked and introduced as the crime scene sketch as plaintiff's Exhibit (p. 553) No. 22. Are you oriented to that, now? The numbers are on the first page.

A. Okay.

Q. That exhibit shows other vehicles present at Northwest Tenth and Portland, doesn't it, sir?

A. You mean other than the scout car itself?

Q. Yes.

A. Yes, sir. It does.

Q. As a matter of fact, this sketch doesn't show the scout car, does it?

A. No, sir. It doesn't.

Q. And it shows the vehicle—how do you spell Rotramel, R-O-T-R-A-M-E-L?

A. Yes, sir.

Q. And it shows two cars basically here and here, doesn't it?

A. Best I can tell from this, yes.

Q. And it shows another car approximately right here (indicating), is that right, sir?

A. Yes, sir.

Q. And another car here (indicating), is that right, right here?

A. Maybe a little bit further east.

Q. About right here (indicating).

A. That looks right.

Q. And another car over here (indicating), is that right?

A. That's fairly close.

(p. 554) Q. And those cars would appear to be cars that are depicted in plaintiff's Exhibits 4-D and 4-E that

were taken that night, wouldn't that, sir? Just to save a little bit of time, this picture, for example, 4-E, shows a Datsun as being this vehicle here?

A. Okay. I've identified this one. That's correct.

Q. Okay. And this one appears to be a Ford is the first vehicle, and I can't tell, that's a Nova, isn't it?

A. I can't tell.

Q. But they certainly seem to be positioned where those are, is that right, in the crime scene sketch?

A. That's correct.

Q. In addition to that, there was a street light right here that has been testified to.

A. I don't recall the light.

Q. Doesn't there appear to be one in the sketch?

A. Signal pole?

Q. Uh-huh. Light.

A. There's something there, but I can't tell what it is.

Q. Are you familiar with that intersection?

A. Fairly well, yes.

Q. Is there a street light there at that intersection or was there on the 4th of October?

A. I'm not sure.

Q. Well, you heard testimony from other officers that there was. (p. 355) You wouldn't dispute that, would you?

A. No, sir. I wouldn't.

Q. Now, at the time that you proceeded to the Will Do Club, the only information that you had was that that you got from the dispatcher, is that right?

A. That is correct.

Q. And that information was, "All officers, Northwest Tenth and Portland, the Will Do Club, an armed robbery in progress, suspect is white male, brown hair, and glasses?"

A. I don't recall now.

Q. Whatever is on the tape is what it was, is that right?

A. I believe so.

Q. And do you recall that you called in and said, "Can I have that description one more time?"

A. No, sir. I don't recall that.

Q. If it's on the tape, you wouldn't deny that, would you?

A. No, sir.

Q. And you said, and the dispatcher told you it was, "a white male, with brown hair and glasses. That's all I have on it." Do you recall that?

A. No, sir.

Q. Now, does that seem to be consistent with the information you had as you approached the Will Do Club on the 4th of October 1980?

A. Yes, sir.

(p. 556) Q. In other words, you had no more information than that, did you?

A. Not at that time.

Q. And there wasn't, at least to the best of your knowledge, any way that William Adam Tuttle could have known that Julian Rotramel would be responding to that call on that evening, is there, sir?

A. That I specifically would respond?

Q. Yes, sir.

A. That's correct.

Q. And there was no way—and you at the time you walked in that door of the Will Do Club to the best of your knowledge, had never had any contact with William Adam Tuttle in your life, had you, sir?

A. That is correct.

Q. And there is no way that William Adam Tuttle baited you into believing that there was an armed robbery in progress, that William Adam Tuttle knew that Officer Rotramel would be coming to this bar on Tenth Street?

A. That he baited me, specifically?

Q. Yes, sir.

A. And not a police officer.

Q. Baited Officer Rotramel?

A. He did not know that I specifically would be there.

Q. So if this jury had been told that, it would not be true, is (p. 557) that right?

A. I'm not sure I understand you.

Q. That's all right. Now, as I understood your testimony, you then parked in front of the door where you described, is that right?

A. Yes, sir.

Q. And you left your spotlight on on your car?

A. I believe that's right.

Q. And then you went in the door?

A. Yes.

Q. And you obviously then weren't too close to Mr. Tuttle when you, when you first came in, were you?

A. When I first came in, no.

Q. And when you go inside at the Will Do Club, it's a little crowded there right inside the door, isn't it, sir?

A. You mean people?

Q. There's just not much room to maneuver there?

A. I don't recall that.

Q. Let me show you the front page of the crime scene sketch, which would appear to be an interior drawing at the Will Do Club, and also to refresh your recollection, I'll show you plaintiffs' Exhibit 4-A, which appears to be a shot looking this way at the club. You see that?

A. I still don't see—

Q. Here's the door. The bar is this way.

(p. 558) A. Okay.

Q. In other words, if it were on the picture, it would be just like that.

A. Yes, sir.

Q. And the crime scene sketch and the photograph show that there's a wall approximately right here; isn't that right, that runs down behind the bar?

A. It looks that way.

Q. And that's what it looks like here, too, in the picture; isn't it, sir?

A. You're speaking of this wall back here?

Q. Yes, sir, where there's a door.

A. Yes.

Q. And in addition to that, there is a bar right here. A railing would be a more appropriate description, is that right?

A. That's correct.

Q. And then in front or down that railing is where the bar itself goes, is that right?

A. Yes.

Q. And the sketch shows that the distance from here to here (indicating), in other words from the wall to that bar is 3'6", is that right?

A. Yes.

Q. The diagram also shows and the picture shows that there's a (p. 559) cigarette machine right beside this door, isn't that right?

A. That's correct.

Q. And this rail appears right here (indicating) at least in the picture appears to be rounded at the top, doesn't it, sir?

A. Yes.

Q. Is that the way you essentially remember it that night?

A. I'm real fuzzy on the interior of the Club, but I'll agree with that.

Q. You were, of course, familiar with the policy on firearms at the Oklahoma City Police Department, weren't you, sir?

A. Yes, sir.

Q. And you were trained in it, is that right?

A. In the policy?

Q. Yes, sir.

A. Yes, sir.

Q. You were trained in the fact and you knew when you went in there that you were to use the utmost discretion in the use of a firearm?

A. Yes.

Q. And you were acquainted with the times when you were and were not allowed to use firearms?

A. Yes.

Q. And you'd also had courses on civil rights?

A. That's true.

(p. 560) Q. And you knew what people's civil rights were, didn't you?

A. Yes.

Q. And as part of your work with the Oklahoma City Police Department and pursuant to the regulations, you were required to prepare a detailed, written report of this incident, is that right?

A. I believe that's right.

Q. And in addition to that, you had talked with officer, Sergeant, or Detective Chambers on that night in question, is that right?

A. I believe that's right.

Q. And do you recall that he told you not to worry, but just to make your report, tell the truth, and refer every detail you could remember into the report?

A. Yes.

Q. And he told you that on the 4th of October 1980, didn't he?

A. Yes, sir.

Q. Prior to the time that you made the report?

A. I believe that's correct.

Q. And you did, in fact, make a detailed, written report?

A. Yes.

Q. And you said that you parked your car facing east, you shut it off, you left the spotlight on the door of the Club, and put your hand-held radio in your back pocket. Do you remember that in your report?

(p. 561) A. Yes, sir.

Q. You said you had your flashlight in your left hand, and you opened the door with your left hand. Is that right?

A. Are you reading from the report?

Q. Yes, sir.

A. Because I don't remember specifically now. (Whereupon witness looked at report.) That's correct.

Q. Are you satisfied that that's what's in your report?

A. Yes, sir.

Q. Incidentally, you had approximately 30 hours of report writing there at the Police Academy, didn't you?

A. That's correct.

Q. Once you entered the place, or prior to entering the bar there, you made no investigation as to alternative entrances or exits, did you, sir?

A. No, sir.

Q. You made no call for a backup?

A. No, sir.

Q. And you didn't have your gun drawn?

A. No, sir.

Q. That's correct, isn't it?

A. That is correct.

Q. You went inside and you tried to look at all the people in there, is that right? That's what you put in your report.

A. That's correct.

(p. 562) Q. And the suspect started — you said in your report — "The suspect started walking toward me while I stood inside the doorway." Do you remember that?

A. Yes, sir.

Q. You didn't see any weapons, did you?

A. Not at that time.

Q. As a matter of fact, you never saw any weapons, did you?

A. No, sir.

Q. And when you went inside, it didn't appear to you that anyone was scared in there, did it?

A. I really didn't have time to gauge everyone's condition at the moment.

Q. Do you recall in your deposition, page 61, line 7 through 9, this question being asked and this answer being given:

"Question: Did there appear to be anybody scared at the time, you know, the bartender or the customers?

Answer: No."

Do you recall that question being asked and that answer being given?

A. Yes, sir. I believe that's correct.

Q. There also did not appear to be anything unusual going on inside the bar as you entered, isn't that right, sir?

A. That's correct.

Q. And no time in the bar was Mr. Tuttle acting like any kind of (p. 563) a tough guy or threatening you or anything, was he, sir?

A. No. He did not.

Q. He made no physical threats to you, did he, sir?

A. He didn't say anything.

Q. He didn't fight, he didn't knock your hand away, and you didn't advise him he was under arrest; isn't that right?

A. No. He did resist me trying to keep him inside the bar.

Q. But you say he pushed against your hand with his chest?

A. And he also tried to pull away, also.

Q. Pardon?

A. He also tried to pull away from my hand.

Q. Okay. And he started walking toward you while you stood inside the door, and then you said in your report, he walked around you and started out the door. Do you recall saying that?

A. Yes.

Q. And at this point, your testimony is very similar to the testimony of the eyewitnesses inside there, isn't that right?

A. From what I've heard, yes.

Q. And you said that you put your — in your report — you put your left hand on him and stopped him from leaving the Club. Do you remember that?

A. Yes, sir.

Q. You also had your flashlight in that hand?

A. That's true.

(p. 564) Q. Incidentally, how tall are you, sir?

A. Six foot.

Q. How tall were you at the time?

A. Six foot.

Q. You put your hand against his chest and you said you could feel him pushing against your hand with his body; do you remember that?

A. Yes, sir.

Q. And you said he matched the description of the armed robber, right?

A. That's correct.

Q. Then you said in your report that you tried to keep an eye on him, and then you corrected your report to say that you were careful to keep an eye on him as you tried to get the attention of the bartender; do you remember that?

A. I don't remember the exact wording. (Whereupon, witness was shown report.) That's correct.

Q. So you said in your report that you tried to keep an eye on him, and you corrected that to say, you were careful to keep an eye on him; is that right?

A. That's correct.

Q. And you say you told him to stay inside the Club for a minute, is that right?

A. Yes, sir.

Q. And "Tuttle continued facing you, but stared at the ground" (p. 565) is what you put in your report?

A. That's correct.

Q. Then you say you took your left hand away from him, and shined a light at the bartender?

A. Is that the next, very next thing that happened?

Q. You said to stay in here for a minute, I believe. You told him to stay inside the Club for a minute, right?

A. Right.

Q. Okay. At this point and time when he's come up to you, and you stopped him, and you're holding the flashlight, and you're holding him — you were holding him by the shirt, weren't you?

A. Yes, sir.

Q. At this point and time where are you standing and where is he standing?

A. I would be right here (indicating), and he would be right next to the door.

Q. You would be here (indicating)?

A. No. That would be him right next to the door.

Q. Just draw on there where you would be.

A. Okay. And this would be me (indicating).

Q. And according to your testimony, where was the barmaid at that time?

A. Okay. He's just walked up to me? Is that where we're at?

Q. Where you're holding him with his flashlight, your flashlight (p. 566) and his shirt?

A. She would be at this end of the bar (indicating).

Q. And where would Beverly be, Beverly Hayes?

A. I can't differentiate in my mind now.

Q. Which one was which?

A. That's true.

Q. Which way are you facing?

A. This would be my back right here (indicating).

Q. So you're generally facing out towards the north end of the Club?

A. Yes, sir.

Q. And which way is Mr. Tuttle facing?

A. Northeast.

Q. Then at that point, it's your testimony, isn't that where you said, "I had a call, stay in here for a minnute," and then you took your left hand away from him, and shined your light at the barmaid?

A. Yes, sir.

Q. At that time you didn't smell any alcohol on him, did you, on Mr. Tuttle?

A. No, sir.

Q. As a matter of fact, you never did, did you?

A. No.

Q. And at that time, you were not working an armed robbery in progress, were you, sir?

(p. 567) A. I wasn't certain.

Q. But you did not, did you, sir? Pardon me?

A. I did not observe an armed robbery?

Q. Well, let me ask you this question, if you recall this question being asked and this answer being given, page 55, line 18, of your deposition:

"Question: Did you observe any armed robbery in progress at that point?

Answer: No. I did not."

Do you recall that question being asked and that answer given?

A. I believe that's correct.

Q. That was accurate, wasn't it?

A. Yes, sir.

Q. You said you shined the light on the barmaid, is that right?

A. Yes.

Q. And when you looked back, the suspect, according to your report, "bent down suddenly for his feet, possibly his left boot." Do you remember that?

A. Yes, sir.

Q. That you grabbed him with your left hand, "best I could, and pushed back against the door." He pushed back against the door, and you told him to be sti!l, do you remember that?

A. Yes.

Q. Now, at this point after you say he reached down towards the (p. 568) boot, are you still standing in the same position?

A. Yes.

Q. Are you still holding onto him?

A. Yes.

Q. So you took your hand away from him, and then put your hand back on him; is that right?

A. For a moment, yes.

Q. And then you took your hand away?

A. After I put it back on him?

Q. Yes, sir.

A. No, sir. It never left him again.

Q. So you held him continuously, your flashlight and Mr. Tuttle by the shirt after that, is that right?

A. I believe that's correct.

Q. Even when he broke from you, you were holding him just when he broke from you?

A. I believe that's correct.

Q. And he ran out the door?

A. Yes.

Q. Turned and ran?

A. Yes.

Q. Are you sure?

A. That's the way I remember it.

Q. But when he reached down, when you saw him reach down, according to your testimony — you understood the barmaid (p. 569) said that didn't happen, you heard her say that?

A. Yes.

Q. When you say you saw him reach down, that could have been the movement of a person merely scratching his leg, couldn't it, sir?

A. It's possible.

Q. And at that point, you felt like you had control of him, didn't you, sir?

A. I don't recall my exact feelings except that I felt like I had the robber.

Q. Pardon me?

A. I felt like I had the robber.

Q. Well, if you felt like you had the robber, you didn't search him, or handcuff him, or physically restrain him, other than just putting your hand on him, did you, sir?

A. That's correct.

Q. And nobody had told you that there was an armed robbery inside the bar, had they?

A. No, sir.

Q. And the reason you didn't search him, or handcuff him, or physically restrain him was because you felt like you had control of him; is that right?

A. For the moment.

Q. And after you say he bent down the second time, you said you pushed him against the door to straighten

him up, and the (p. 570) door opened slightly outward; do you remember that?

A. Yes.

Q. And the subject continued looking at his feet? Do you remember?

A. Yes.

Q. And at this point, this is when you say the barmaid first came over?

A. That's correct.

Q. So at this point, the only substantial difference between your testimony and their testimony, is you have the bartender coming up later, and they say didn't see any movements towards the feet. Does that sound about right?

A. I believe that's right.

Q. And you asked her if she had called to report an armed robbery? You remember you put that in your report?

A. Yes, sir.

Q. And she said, "robbery." That's what you put in your report?

A. Yes.

Q. And at that time, Mr. Tuttle turned and ran out the door? Is that your testimony?

A. He started pulling away when I said, when I asked her the question.

Q. And did he turn and run out the door?

A. Yes, sir. He did.

Q. Now are we speaking of this door here, the west door (p. 571) (indicating)?

A. Yes.

Q. Incidentally, you didn't come in the east door, did you?

A. No, sir.

Q. You never made any entrance or exit through the east door at all, did you?

A. No, sir.

Q. And when he turned and ran out that door, you were still standing right here, is that right?

A. That's correct.

Q. And I believe your testimony was "the door sprang shut." It was spring levered?

A. Yes.

Q. Do you remember that? And when he turned and ran out that door, you saw him turn and run, didn't you, if you had your hand on him?

A. I was facing the barmaid.

Q. Well, as I understand it, you're facing this way and you're holding him like this, although you're being careful to keep an eye on him, right?

A. Correct.

Q. And he's got his back to the door?

A. Yes.

Q. And he—she said, "robbery," and at that moment, he turned around and runs right out that door, and the door slams back (p. 572) in your face; is that right?

A. That's when he—he had already made that movement before she ever said anything.

Q. But did you see him go face first out that door?

A. My mind right now, I can't say that I did.

Q. Well, you had your hand on him?

A. That's correct.

The Court: May I see counsel at the bench?

Mr. Hughes: Yes, sir.

(The following procedures were had at the bench out of the hearing of the jury:)

The Court: We're going to have to take a luncheon recess, as I have a scheduled pretrial conference. I think I'll have the jurors come back at two o'clock and resume at that time. But in the meantime, I want you gentlemen to confer with my law clerk at 1:15 about proposed instructions. Okay. I'll excuse the jurors until 2:00, and you get together at 1:15.

Mr. Hughes: Thank you, Judge.

(The following procedures were had within the hearing of the jury:)

The Court: Ladies and gentlemen of the jury, I apologize for keeping you late during the luncheon hour, but we were hoping to complete the defense of this case prior to recess for lunch. It appears that that's not quite possible. (p. 573) I'm going to allow you until two o'clock

to have lunch and ask you to be back in the jury assembly room at 1:55, and we will resume shortly thereafter. I have another matter scheduled at 1:30, which might overlap just a bit beyond that two hour starting period, 2:00 P.M. starting period, but I hope not. I'll remind you again of my previous admonitions. Everyone please stand. Court in in recess.

(Noon recess)

(p. 574) The Court: Be seated, please, ladies and gentlemen of the jury. Go ahead, Mr. Hughes:

Mr. Hughes: Thank you, Judge.

Julian Rotramel

(Continuation of cross-examination)

By Mr. Hughes:

Q. Before we left, you told me several times about how Mr. Tuttle had turned and run face first out the door. Officer Rotramel, that isn't exactly true, is it, sir?

A. That I said he ran face first out the door?

Q. Yes, sir.

A. I didn't say that, did I?

Q. You said you saw him, he had his back to the door and that you saw him turn and run out the door, didn't you?

A. No, sir. I believe I said that I was more facing the barmaid, and I had my hand on him as he left.

Q. Do you deny that you told this jury on several occasions before we broke for lunch that you were holding

him by the hand, and then he turned, he had his back to the door, and then he turned and ran out the door?

A. That's what happened, yes.

Q. But the truth of the matter is, as related in your report, the suspect backed out the door; didn't he, sir?

A. That's what I had written there.

Q. Now, the honest to goodness truth of the fact, you're a (p. 575) little hazy on the events that occurred out there, aren't you, sir?

A. Some of them, yes.

Q. Yes, sir. Well, when you made your report, you made your detailed report as the rule requires and Mr. Chambers told you to do, you left out some facts in the report; didn't you, sir?

A. No, sir. None that were pertinent, I don't believe.

Q. Well, you didn't put in your report that you made no investigation as to alternative entrances and exits, did you, sir?

A. Did I—no, sir. I didn't.

Q. And you didn't put in the detailed report that you didn't call for a backup, did you?

A. No.

Q. You didn't even put in the report that you never saw a weapon, did you, sir?

A. I don't believe it says that.

Q. You never put in the report that you didn't see anybody scared inside the bar? You didn't put that in there, did you?

A. I don't believe so.

Q. You didn't put in there that there didn't appear to be anything unusual going on inside either, did you sir?

A. No, sir.

(p. 576) Q. You didn't put anything in the report that would indicate that Mr. Tuttle wasn't acting like a tough guy or anything?

A. No.

Q. You didn't put any words to that effect, did you? Pardon me?

A. I didn't put any words to the effect that he was acting tough?

Q. Right.

A. No, sir.

Q. He was not acting tough?

A. That's not in my report.

Q. You didn't put anything in there about not having observed an armed robbery in progress in there?

A. No, sir.

Q. Now, again returning to the point and time when Mr. Tuttle broke from you and, as you said, ran out the door, you immediately at that point shouted "halt," didn't you?

A. As he broke from me?

Q. Isn't that what you put in your report, "I immediately shouted halt and ran out?"

A. Yes, sir.

Q. And when you shouted halt, according to your version of the event, you shouted it loudly; is that correct?

A. That's correct.

Q. That's how you described it?

A. Yes, sir.

(p. 577) Q. And you said that you shouted, and you said later that it was loud, or loudly, right?

A. Yes, sir.

Q. And at that point, as Mr. Tuttle, as you said broke from you and ran out the door, or as you put in your report, "backed out the door," you were not in danger of your life and had not been at least in terms of what you thought; is that right, sir?

A. As he left the club?

Q. Yes, sir. As he left the club.

A. No.

Q. Was my statement correct?

A. I believe so.

Q. Now, you came out the door, you said you "could see the suspect crouched down." That's what you say in your report, isn't it, sir?

A. As the door shut, I could see him crouched, yes.

Q. Okay. See if you can tell me where your report says anything about the door shutting. This would appear to be the portion where you were beginning to discuss it. You say, "As soon as I cleared the door, I could

see the suspect crouched down with his right hand near his feet."

A. That's correct.

Q. Right? And it doesn't really say anything about the door closing, does it?

(p. 578) A. Only in that I cleared the door and the door was spring loaded so—

Q. It doesn't say anything about it being spring loaded in there.

A. No, sir. It doesn't.

Q. But you recall of your own independent recollection that the door did close, is that right?

A. To the best of my knowledge, yes, sir.

Q. And when the door—after the door closed, according to your testimony, is the first time that you ever unholstered your weapon; is that correct?

A. I couldn't say exactly when.

Q. Didn't you testify that you drew as you cleared the door?

A. I believe it would be in that time we're talking about, a matter of seconds.

Q. When you say you cleared the door, what does that mean, sir?

A. That means that I came from behind the door. That is the diagram shows the door opened out in this manner.

Q. And after you got out, that's what you mean by clearing the door?

A. Yes, sir.

Q. And does that in you terminology include the door closing behind you?

A. Clearing the door would mean the door closing behind me?

Q. Is that what your—is that how you use the term?

(p. 579) A. Yes, sir.

Q. So are you now comfortable with the fact that you did not unholster your weapon until you cleared the door and it was closed?

A. No, sir.

Q. Do you recall in your deposition, page 65, lines 6 and 7, this question being asked and this answer being given:

"Question: But you drew down on him with the weapon?

Answer: As I cleared the door, yes."

Do you recall that question being asked and that answer being given?

A. I believe I do.

Q. Does that now refresh your recollection as to when your testimony is you first drew your weapon?

A. If that's what I said, then I must have had it drawn when I cleared the door.

Q. Do you recall?

A. To tell you the truth, I do not.

Q. Is that one of those facts that's a little hazy in your mind, too?

A. When I drew my weapon is hazy, yes, sir.

Q. Now, is there any doubt in your mind that when you fired you had the weapon at shoulder height or you were holding it up like this?

(p. 580) A. It would be higher than my waist and then the highest shoulder height.

Q. And you were holding the weapon with both hands?

A. I think so.

Q. At the moment that you pulled that trigger, was that door closed?

A. Yes.

Q. Are you sure of that?

A. Fairly certain.

Q. So according to your version of the event, with Mrs. Hinds and Mrs. Hayes still inside the bar, it would have been impossible for either or both of them to have seen the flame from your weapon as it's fired?

A. That's correct.

Q. Did your weapon flame?

A. I assume it did being it was at night and this weapon would make a certain amount of fire, flame.

Q. And it would have been a physical impossibility, according to your version, for those people to have seen it?

A. Yes, sir.

Q. They certainly were not outside with you, were they?

A. No, sir.

Q. Now, you say in your report as I read it that the suspect was crouched down when you cleared the door. Do you recall that?

A. Yes, sir.

(p. 581) Q. But you can't really describe to the court and jury what that—what you mean by crouched down, can you?

A. I could see it, but I could not describe it.

Q. You couldn't say if he was crouched down, for example, like a catcher? You can't say that, can you?

A. No.

Q. That's because you don't recall that, isn't that correct?

A. Well, I recall that he wasn't crouched like a catcher.

Q. Do you recall in your deposition this question being asked and this answer being given, on March 24, 1982, at page 65, lines 16 through 18:

"Question: Was he crouched down such as one would squat like a catcher?

Answer: I don't recall."

Do you recall that question and answer?

A. Yes, sir. I believe I do.

Q. Was that question asked and that answer given at your deposition?

A. If that's what it says, yes sir. (Whereupon, counsel showed deposition to witness.) Yes, sir.

Q. Is that what it says?

A. Yes, sir.

Q. And you can't tell us if what you observed out there was an individual crouched down like he was bending over to touch his toes, can you, sir? You don't recall that either, do (p. 582) you?

A. If he looked like he were touching his toes?

Q. Pardon me?

A. I'm sorry. I didn't understand the question.

Q. The question is was he crouched down like he was bending over to touch his toes?

A. If he was exercising in the parking lot?

Q. Pardon me?

A. Bending over to touch his toes?

Q. Yes, sir. When you described—you say he was crouched down.

A. No, he wasn't.

Q. We're trying to establish what the crouch was like.

A. Okay. You're correct.

Q. You were asked, just to refresh your recollection, was he bent over in a crouch like he was trying to touch his toes, and you said you couldn't recall that either, didn't you, sir?

A. Yes, sir.

Q. And you were also asked if he was crouched down like he was going to jump on somebody. Do you remember that?

A. Not specifically.

Q. But you couldn't recall even that, could you, sir?

A. If that's what the deposition says, yes. (Whereupon, counsel showed deposition to witness.) That's correct.

(p. 583) Q. Is that what the deposition says?

A. Yes, sir.

Q. In any event you pulled your—it's your testimony or your report, anyway—I guess your testimony here today—that you shouted halt for a second time when you saw him crouched down?

A. That's correct.

Q. And then at that point William Adam Tuttle was facing away from you, wasn't he, sir?

A. His body was.

Q. His back was for sure, wasn't it?

A. Yes, but his body was.

Q. And he was facing away from you, too, wasn't he, sir?

A. When I made my presence known by hollering a command, he turned his head towards me.

Q. Only his head?

A. To the best of my recollection, yes.

Q. When you saw him crouched, he was facing away from you, though, wasn't he?

A. Yes.

Q. Then you shouted halt again. This would be the second time, once when he broke from you and you said he ran out the door, and for the second time after you saw him in a crouch; is that right?

A. That's correct.

(p. 584) Q. And when you shouted halt again, you shouted it loudly, didn't you, sir?

A. Yes, sir.

Q. And it's your testimony that Mr. Tuttle then jumped up?

A. Yes.

Q. And you clearly saw him jump?

A. Yes, sir.

Q. Is that clear in your mind here today?

A. Yes, sir. It is.

Q. How high did he jump?

A. I couldn't say.

Q. Did he jump—did you see him move up?

A. Yes, sir. I did.

Q. Before you fired?

A. Yes, sir.

Q. So he was up when you fired?

A. He was coming up, yes.

Q. Was he standing up?

A. No.

Q. How far up was he as you would describe him?

A. I would describe him as half way towards completion of an upright stand.

Q. Would that be about like this (indicating)?

A. Yes, sir.

Q. So his back would be about a 45 degree angle to the ground?

(p. 585) A. I couldn't approximate.

Q. Well, that would be about half-way up, wouldn't it?

A. If you say so.

Q. I'm asking you.

A. I'm not very good at the angle.

Q. But that's when you fired, is that right?

A. I believe that would be correct.

Q. And he clearly already jumped when you fired?

A. Oh, yes, sir.

Q. Now, at this point and time, at the point that you pulled the trigger and brought him to his death, William Adam Tuttle had committed no felony; had he, sir?

A. As it turned out later, no.

Q. And you had made no attempt to run after him?

A. No, sir.

Q. You had made no attempt to get in your car and follow him if he fled?

A. No, sir.

Q. As a matter of fact, you had never even seen him pull his pants leg up so he could get into his boots, did you, sir?

A. No.

Q. And all this time, you, as an officer of the Oklahoma City Police Department, were watching for a weapon, weren't you?

A. Yes, sir. I was.

Q. You were—that's one of the major things you were (p. 586) concentrating on was watching for a weapon, is that right? Pardon me?

A. From Mr. Tuttle?

Q. From Mr. Tuttle.

A. Yes, sir. I was.

Q. And you never saw a weapon, did you, sir?

A. No, sir.

Q. And you never thought about shooting him in the arm or the leg?

A. No, sir.

Q. And you never thought about other types of apprehension that were available to you, did you, sir?

A. No, sir.

Q. And you had other types of apprehension available to you, didn't you?

A. At the time that I shot him?

Q. Yes, sir.

A. Apprehension wasn't the question at that time.

Q. My question, sir, is did you have—you did have, didn't you, other types of apprehension available to you—

A. Yes, sir.

Q. —at the moment you pulled the trigger?

A. Yes, sir.

Q. For example, you could have, quote, clobbered him with your flashlight?

(p. 587) A. Yes.

Q. Where was your flashlight?

A. In my left hand.

Q. At that moment when you pulled the trigger?

A. I believe it was, yes.

Q. So you're telling this jury that you were drawing down on a man holding a weapon with two hands and a flashlight, too?

A. That's correct.

Q. As a matter of fact, you could have done a lot of things other than what you did, couldn't you?

A. It is possible.

Q. And you had had training at the Oklahoma City Police Department which included these films, "Shoot! Don't Shoot!" is that right?

A. Yes, sir.

Q. And you knew what the regulations were in Oklahoma City, didn't you?

A. Yes, sir.

Q. A[illegible]ou knew that you were to bear in mind the value of human life, didn't you, sir?

A. Yes.

Q. And you knew that you were to exercise the utmost discretion in the use of your weapon?

A. Yes, sir.

Q. And you really didn't exercise the utmost discretion in the (p. 588) use of your weapon, did you, sir?

A. Yes, I did.

Q. You think you did?

A. Yes, sir. I did.

Q. If you had to do it over, would you do it again?

A. Yes, sir. I would have to.

Q. Without any hesitation?

A. Yes, sir.

Q. That's the way they trained you, isn't it?

A. I believe so.

Q. "The use of a firearm by an officer is not justified if an apprehension and/or arrect can reasonably be made without violence." Is that right, sir?

A. Yes, sir.

Q. At approximately 8:08 p.m. on the 4th day of October 1980, you could have arrested William Adam Tuttle reasonably and without violence, couldn't you, sir?

A. At what time?

Q. Approximately 8:08 p.m.

A. When I first arrived, yes, I could have.

Q. And you could have arrested him at any time, too, couldn't you, sir?

A. I could have tried.

Q. "The use of firearms is not justified when the use of deadly force"—well, "justified if used to fire a warning shot or (p. 589) apprehend a misdemeanant." You didn't fire any warning shot and William Adam Tuttle at that point was only a misdemeanant, wasn't he, sir?

A. As it turned out, yes, sir.

Q. Yes, sir. And that's all he was?

A. Yes, sir.

Q. And you had no way of knowing he was anything other, did you, sir?

A. Not at that time.

Q. "The use of deadly force is not to be used when the use of deadly force constitutes a greater threat to innocent human lives than allowing the criminal to escape." You knew that, didn't you?

A. Yes, sir.

Q. And you didn't follow that, did you?

A. Where does that apply?

Q. You don't even understand that? That the use of firearms is not justified when the use of deadly force constitutes a greater threat to innocent human lives than allowing the criminal to escape?

A. I was not concerned with his escape. It might well be.

Q. Well, let's see, you had a car here, didn't you?

A. Yes, sir.

Q. You knew that other units would be there shortly?

A. I felt like there would be.

(p. 590) Q. You had plenty of room for cover there if you had chosen that, didn't you?

A. Behind the car?

Q. Yes, sir.

A. No, sir. I couldn't have made it.

Q. You were only 6 to 8 feet from it at that time, is that right?

A. I would guess about 10 feet.

Q. So the testimony of the other officers would be inaccurate?

A. Yes, sir.

Q. You had a Kell light, didn't you?

A. I had a flashlight.

Q. Was it a Kell light?

A. I'm not certain of the brand name.

Q. It was in your hand?

A. Yes, sir.

Q. Mr. Tuttle wasn't armed, was he?

A. As it turned out, no, sir.

Q. And he really wasn't even—he wasn't making any attempt to kill you, was he?

A. As it turned out, he never had a chance.

Q. That's true. He never had a chance, did he?

A. He never had a chance to kill me.

Q. Because you killed him first?

A. I shot him first.

(p. 591) Q. And he died?

A. That's correct.

Q. Isn't that killing him first?

A. Yes, sir.

Q. Now, after this was over with, you had occasion to meet with other officers of the Oklahoma City Police Department, including the Acting Chief of Police, Captain Richard Delaughter, is that right?

A. I believe that's correct.

Q. Captain Delaughter—you heard him testify here in court?

A. Yes, sir.

Q. And do you recall meeting with Captain Delaughter on that evening?

A. No, sir. I do not.

Q. You don't deny meeting with him, do you?

A. If he said I did, then I did.

Q. Whatever he said would be right, wouldn't it?

A. Yes, sir.

Q. And when you met with him—let's just assume hypothetically that you did meet with him that night.

A. Yes, sir.

Q. If—you knew him, didn't you?

A. Yes, sir.

Q. And you knew that he was the main man in charge of the Oklahoma City Police Department that night, didn't you, sir?

(p. 592) A. I knew he was shift commander for my shift, yes.

Q. And you knew he was a field captain?

A. Yes, sir.

Q. And you knew that field captains are the acting chiefs after hours and on weekends, didn't you?

A. No, sir. I didn't know he was the acting chief.

Q. Well, you knew he was the head man on that shift anyway, didn't you?

A. Yes, sir. I did.

Q. And you, of course, would try to tell him the truth as best you could?

A. Yes, sir. I would.

Q. And did you know Officer S. Moss, I believe it's Stanley Moss?

A. Yes, I know him.

Q. And were you—did you meet with him that night?

A. I don't recall. I don't believe so.

Q. Well, he was interested in the case because he was investigating it, wasn't he?

A. I believe he was just to go with Mr. Tuttle to the hospital.

Q. Maybe I used the term investigated too loosely. He was on the scene and he went with the Hill fellow to follow the—he said he followed the ambulance to the E.R. Room; is that right?

A. If that's what he said, yes.

(p. 593) Q. Yes. So you would assume he was interested in the case, wouldn't you?

A. Yes, sir. I would.

Q. Now, do you recall when you made your, gave your deposition, an inquiry was made of you as to whom you had talked to with regard to the incidents out there on October 4, 1980?

A. Yes, sir. I remember that.

Q. And do you remember that nowhere in your deposition did you mention talking to Captain Delaughter?

A. No, sir. I don't recall saying that, but I don't remember talking to Captain Delaughter that night. (Whereupon, counsel handed deposition to witness.)

Q. We excluded in the inquiry, mothers, dads, brothers, sisters, and lawyers; is that right? We didn't ask you about that?

A. Yes, sir.

Q. Of course, Captain Delaughter wouldn't fit into any of those categories, would he?

A. No, sir.

Q. Have you read that now?

A. Yes, sir.

Q. Nowhere in there do you mention that you talked to Captain Delaughter, do you?

A. That's correct, sir.

Q. But you do mention that you talked to Stan Moss?

A. Yes.

(p. 594) Q. Pardon?

A. I said I believe so. Is that what it says?

Q. Yes, sir. I believe that's what it says. And when you talked to Officer Moss, you told him that you went in the east door, didn't you, sir?

A. Sir, I don't recall talking to Officer Moss.

Q. Well, you heard his testimony by deposition in this case, didn't you?

Mr. Mahoney: Your Honor, I object. He's already said he didn't recall.

The Court: Sustained.

Q. Maybe I can ask it this way. Did you tell Officer Moss that you went in the east door on the night in question?

A. No, sir.

Q. You deny that?

A. Yes, sir. I don't recall telling anyone I came in the east door.

Q. Okay. And you heard Captain Delaughter testify that you told him that you responded to an armed robbery call, went inside the bar, and asked the barmaid if a robbery was taking place, and the barmaid said she had no knowledge of this?

A. I —

Q. Do you recall that?

A. I remember him testifying that.

Q. And he also testified that you told him that shortly after (p. 595) these events on the 4th of October of 1980, isn't that right?

A. That's what he said, yes.

Q. And you don't deny what he said, do you, sir?

Q. Now, you recall you were aware at the Oklahoma City Police Department a memo that circulated around there, weren't you, sir?

A. In reference to this case?

Q. Yes, sir.

A. Yes, sir.

Q. And what did the memo say?

A. I was told that it said in reference to —

Mr. Mahoney: Your Honor, I'll object to that as hearsay to him. He hasn't seen the memo.

The Court: Sustained.

Q. Do you know that the memo said: "In the matter of Oklahoma City Police versus William Tuttle, we aim to please?"

Mr. Mahoney: Objection.

The Court: Sustained, I believe, counsel. He said he was told that. He doesn't know of his own.

Q. Oh, did you see the memo?

A. No, sir. I did not.

Mr. Hughes: May I have just a moment, Your Honor?

The Court: Sure.

Mr. Hughes: Excuse me, just a second, Your (p. 596) Honor. Your Honor, may I approach the bench?

(The following proceedings were had at the bench out of the hearing of the jury:)

Mr. Hughes: Do you—I don't want to get in trouble. Do you not want me to ask him any other hypothetical questions?

The Court: No. I don't think he needs to go into that. Probably not. Hypothetical would have a bearing on what he should have done from other officers, but I don't think there's any point in asking him. He's testified as to what he did under the circumstances. Redundant and waste of time, counselor.

Mr. Hughes: That's why I asked.

(The following proceedings were had within the hearing of the jury:)

Q. At the time that Officer Lennox came upon the scene and you first saw him, were you holding your weapon on Mr. Tuttle at that time?

A. As best I recall, I believe I was.

Q. Okay. Would it be fair to say that you were merely acting on suspicion in your attempts of apprehending William Adam Tuttle on that night?

A. Yes. That would be correct.

Q. And you were taught in your training film, "Shoot! Don't Shoot!," that you couldn't just act on suspicion, weren't (p. 597) you?

A. I believe that's correct.

Q. And when you were trained, did they at the Academy give you anything upon which to make discretion judgments? You know, did they give you certain factors to weigh in making a discretion judgment such as you made on the 4th day of October 1980?

A. I don't believe so.

Q. Now, they did give you a course, as I understand, on civil rights; is that right?

A. That's correct.

Q. And you understood that a citizen of the United States in Oklahoma City or even Bartlesville, has the constitutional right to a trial to face his accusers and things of that nature, didn't you, sir?

A. Yes, sir.

Q. And you knew that a person had the right under our constitution not to be deprived of life, liberty, or the pursuit of happiness; didn't you, sir?

A. Yes, sir.

Q. And at the moment you pulled that trigger, you were well aware of those rights; weren't you, sir?

A. Yes.

Mr. Hughes: I believe that's all, Your Honor.

The Court: Anything further?

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(p. 135) The Court: Sure.

Mr. Gassaway: "Oklahoma City Ordinance, Division 1, Offenses against public safety, interfering with a city officer or officials." In part, Section 21-27: "No person shall resist or lend aid to resist against any officer discharged with the duty, or break or attempt to break from custody after having been arrested and taken into custody, or harass or attempt to harass or mislead any officer by false alarms or unauthorized use of any device of whatever nature to summon police or fire protection or other emergency aid without reasonable cause. $35 fine."

Mr. Gassaway: I'll proceed with Officer Lennox, now. "In the United States District Court for the Western District of Oklahoma, Rose Marie Tuttle . . . "

The Court: You can waive that if you want to, Mr. Gassaway.

Mr. Gassaway: Thank you, Your Honor, I'll just read —

The Court: We'll take notice that it's in this style case, and that the deposition was taken on March 22, Michael Gassaway appearing for the plaintiff, Richard Mahoney for the defendant.

(p. 136) Mr. Gassaway: Thank you very much, Your Honor.

(Whereupon excerpts from the deposition of Riley Lennox were read into the record:)

"Q. Would you state your full name for the Court and record, please, sir?

A. Riley L. Lennox.

Q. Where do you live, Mr. Lennox?

A. 123 N. W. 15, Oklahoma City.

How old a man are you?

A. 39.

Q. What is your business or occupation?

A. Police officer of the Oklahoma City Police Department.

Q. What is your job title there?

A. Patrol Officer.

Q. How long have you been employed as an Oklahoma City police officer?

A. Four years.

Q. On or about the 4th day of October, 1980, did you have occasion to investigate a shooting at the corner of Northwest Tenth and Portland?

A. I had occasion to be present, yes, sir.

Q. Can you tell me how you came about being present at that scene?

A. Through a dispatch radio call that came over all (p. 137) channels in reference to an armed robbery in progress.

Q. Do you know Officer Rotramel?

A. Yes, sir. I do.

Q. Did you know him at the time of the investigation of this armed robbery in progress?

A. Yes, sir.

Q. When you got this call, approximately what time of day or night was it?

A. Exactly, I don't recall. It was after dark.

Q. The report says at 20:08 hours. When would that have been?

A. That would be 8:08 P.M.

Q. Was that fairly accurate to the best of your recollection?

A. Yes, sir.

Q. Did you all have a specific school in police training on handling an armed robbery call?

A. Yes. We had a block in that.

Q. If you're riding in a patrol car by yourself and you get a call about an armed robbery in progress inside a bar, what were you taught as far as how you handle that?

A. Totally on how to handle it?

Q. Yes.

A. Number one, if you do not have one assigned to you, (p. 138) request a backup unit. Number two, do not approach the business or residence, whatever it may be, directly in front, and approach slowly and with caution.

Q. By saying not to approach it directly in front, does that mean to work a side door or back door as opposed to going in the front door?

A. No, sir. I mean by that don't pull your car directly in front of the front door and get out in front of the front door.

Q. I see your report says that you called the dispatcher and said you were a 1097. Does that mean you arrived at the scene?

A. Yes, sir.

Q. Did you get inside the building before anything unusual happened?

A. No, I did not.

Q. What, if anything, unusual did happen at that time?

A. I heard what I thought to be a gunshot coming from the other side of the building.

Q. What did you do?

A. I proceeded to the west side of the building along the south wall.

Q. How far did you get?

A. I was approximately halfway along the south wall of the building when I observed the subject on the

ground (p. 139) in the parking lot, not directly in front of me, but approximately 20 feet or so in front of me."

Mr. Gassaway: May I approach the witness, Your Honor? "Proceeding along the south portion of the building going to the southwest corner (pointing to drawing).

Q. Would you place in the parking lot in reference to the southwest corner of the building where you would be in relation to the southwest corner of the building?

A. Approximately, as best as I can recall, maybe six feet of the southwest or south wall and two to three feet west. That's an estimation."

Mr. Gassaway: Would you point that out, Mr. Hughes?

Q. Is there a sidewalk there?

A. Yes, sir. There is.

Q. Was he on or off the sidewalk?

A. Off the sidewalk.

Q. Would it be fair to categorize him as close to the edge of the sidewalk?

A. He was within a few feet.

Q. Like a step or two?

A. Yes, that would be a good approximation.

Q. What appeared to be the condition of the subject?

A. Well, initial appearance, he was doubling over from where I was standing when I first observed him. And that (p. 140) was it, the subject on the ground doubled over.

Q. Did he appear to have been shot?

A. Not at that moment, no.

Q. So you couldn't see any blood at that time?

A. No, sir.

Q. Was he on his elbows or knees or was he on his back doubled up or his side doubled up?

A. As I recall initially, he was, I believe, on his knees, if I remember correctly. I'm not sure.

Q. What did you do when you saw the man on the ground?

A. The next thing I observed was Officer Rotramel. As I proceeded down the sidewalk, Officer Rotramel was standing there north of him.

Q. What was he doing?

A. He was standing there holding his service revolver on the subject.

Q. How far from the subject was he?

A. Again, it would be an approximation, but I'd say six to eight feet.

Q. Was he at the front door of the Club?

A. Adjacent to it.

Q. Was anything said at that time?

A. By myself?

Q. By either one of you?

A. Officer Rotramel, his exact words I don't recall, (p. 141) he hollered at me something to the effect, check his boot, he was going for something, check his boot.

Q. Did you?

A. Yes, sir. I did.

Q. Did you observe anything?

A. No. I didn't observe anything.

Q. Did you find anything?

A. No. Of course, I didn't stick my hand down in his boots at all. All I did was grab the top portion of the boot where — I don't know what I want to call it — the upper portion of the boot where —

Q. Like the loop where you pull them up, is that what you're talking about?

A. I took my hand and just squeezed around.

Q. Squeezed the top of the boot?

A. One hand and squeezed the top of the boot, yes.

Q. Were they cowboy boots?

A. I don't recall. I believe they were.

Q. You squeezed the top of the boots because Rotramel said check for a gun, right?

A. No. He said check his boot, he was going for something.

Q. In your mind did you think he would go for a weapon?

A. In my mind that's what I thought.

(p. 142) Q. You checked the boots to your satisfaction. There wasn't a weapon; is that correct?

A. Partially correct.

A. Well, let's say that the Operations Manual, like any police procedure manual, is the guideline.

Q. Is it the policy not to use firearms to apprehend a misdemeanant, a person who has committed a misdemeanor, either within or without your presence, the discharge of a firearm?

A. Yes, that's correct.

Q. Would it be fair to say that you shouldn't use your firearm except as a last resort?

A. That would be a fair statement.

Q. Hypothetically speaking, I would like for you to assume these facts to be true, just a pure hypotheatical question: One, that you received a call of an armed robbery in progress. Okay?

A. Uh-huh.

Q. Two, that the armed robbery in progress call relates to an armed robbery in a bar. Three, that you arrive at the bar by yourself, entered the premises, and were advised that there was no armed robbery in progress. Four, and a man fled the bar. Five, that you apprehended or attempted to apprehend the man and he (p. 144) fled from you. Would you shoot him?"

Mr. Mahoney: Your Honor, I object. That's a false hypothetical and, in addition, Officer Lennox is not a man who is supervisory personnel of the police department and qualified to give that answer.

The Court: Overruled.

"Q. Would you shoot him?

A. Based on those facts only?

Q. Well, you wouldn't have left the man laying there alive with a weapon in his boot if the officer thought there was a weapon there, would you?

A. No.

Q. Did you follow police policy and regulations in checking the boots the way you did?

A. No. As I stated, I didn't do a complete check of the boots like you would normally do.

Q. So your answer is no. You didn't follow policies and procedures if that's partially true? But to your satisfaction, you felt safe?

A. Yes.

Q. Did the victim tend to be fairly active either jerking around or trying to get up or flopping around? Can you categorize for us?

A. He wasn't flopping around per se. He was obviously in pain. He was bleeding badly. He was making an effort to get up. He was having difficulty breathing.

Q. Was he verbalizing?

A. Yes.

Q. Just crying, yelling, or was he saying words?

A. The only thing I can recall he was saying was that (p. 143) he couldn't breathe.

Q. Let me ask you this: Are you supposed to follow the Oklahoma City Police Department Operations Manual in the use of firearms?

Q. Yes, sir.

A. Based on that, no, I wouldn't shoot him.

Q. Now, let's assume all of those facts and add this additional fact, that he stumbled off the side of this sidewalk, and you couldn't decide whether he was stumbling off the sidewalk, or he was reaching for something in his boot. Would you shoot him?"

Mr. Mahoney: Your Honor, I object to that. The fact that he was stumbling or reaching are not the evidence at this point.

The Court: All right. Overruled.

Q. You may answer.

A. Well, you're placing me in the difficult situation because you're saying he stumbles off. Actions play a big role and what is said by the officer to the suspect and his response plays a big role.

Q. Now, you haven't had any communication between the suspect (p. 145) and the officer. Nothing is said. No words of apprehension such as "halt! stop!," or whatever at this point and time of the hypothetical. The suspect merely runs from the bar. The officer goes outside, and the officer observes the man, which was a judgment call as to whether he was stumbling off the curb or whether he was reaching down towards his boot. Based only on those facts, would you shoot the man?

A. Nothing has been said?

Q. Nothing has been said by either party.

A. The man's merely bending down?

Q. Either bending down or stumbling, you can't tell which.

A. Just merely bending?

Q. Yes.

A. In that case, no. I wouldn't shoot him.

Q. Let's add these additional facts to those, that the officer said, "halt!," and then the man appears to either stumble or to reach down, would you shoot him?

A. No.

Q. Let's say the man bends over and looks back at the officer, looks back, and the officer says, "halt!," and the guy just stands there and just looks at him. Would you shoot him?

A. Stays down. By that you mean —

Q. Stays down in a crouched position.

A. Stays still and just looks?

Q. Stays still and looks, freezes.

(p. 146) A. Where are his hands?

Q. Down by his boots in his front.

A. No, I wouldn't shoot him.

Q. Let's say the man stumbles, falls to the ground, and gets back up and starts running, would you shoot him?

A. Based on the previous circumstances, no.

Q. Assuming all the other facts and adding that one?

A. No.

Q. Let's say the man doesn't stumble, doesn't reach for his boots, just runs, would you shoot him?

A. No.

Q. Let's say the man stops, turns around, and starts running back at you, no apparent furtive moves of any

type, just stops, turns around, and starts running straight back at you. Would you shoot him?

A. No."

Mr. Gassaway: Okay. That's all, Your Honor.

The Court: Do you wish to read any excerpts at this time, Mr. Mahoney?

Mr. Mahoney: Yes, Your Honor.

The Court: You can do so now or reserve them to later, whichever you prefer.

Mr. Mahoney: I prefer to do so at this moment, Your Honor.

The Court: Fine. Go ahead.

(p. 147) Mr. Mahoney: Mr. Hughes, page 23. Mr. Gassaway's read lines 13 through 26. If he could read those and continue to page 24, line 13.

"Q. You squeezed the top of the boot because Rotramel said check for a gun, right?

A. No. He said check his boot, he was going for something.

Q. In your mind, did you think he would go for a weapon?

A. In my mind that's what I thought.

Q. Checked the boots. To your satisfaction there wasn't a weapon, is that correct?

A. Partially correct.

Q. Well, you wouldn't have left the man laying there alive with a weapon in his boot if the officer thought there was a weapon there, would you?

A. No.

Q. So at least to that extent you were satisfied he didn't have a weapon, would that be a fair statement?

A. Partially correct. The reason I just squeezed the top of the boot itself is because I, yes, was thinking weapon, thinking gun, and my first assumption was that if there was a gun in the boot, it would probably be able to be felt at the top of the boot. However, the victim, too, was at that time squirming because of his wound making it very difficult for me to do the type of search that I normally would have done to someone. Therefore, I squeezed the top of the boot. I (p. 148) also had his pockets in his shirt and pants."

Mr. Mahoney: That's all.

Mr. Gassaway: Let me finish it up.

"Q. And found no weapon.

A. At that time I didn't."

Mr. Gassaway: Okay.

The Court: You may step down. Call your next witness, Mr. Gassaway.

• • •

(p. 462) Mr. Mahoney: Riley Lennox

The Court: Raise your right hand and be sworn, please. Swing that microphone so you can speak directly into it.

A. Yes, sir.

Riley Lennox

Called as a witness, having been first duly sworn, testified as follows:

Direct examination

By Mr. Mahoney:

Q. Officer, state your name and occupation, please.

(p. 463) A. Riley Lennox, police officer, Oklahoma City Police Department.

Q. Officer Lennox, were you employed by the police department on October 4, 1982?

A. Yes, sir. I was.

Q. Officer, on that night about, shortly after eight o'clock, were you at the Will Do Club at Tenth and Portland?

A. Yes, sir.

Q. What brought you there?

A. I was a backup unit of a robbery in progress call.

Q. When did you arrive at the Will Do Club?

A. The time?

Q. Yes, Sir.

A. Exact time, I don't recall. Just momentarily after the call came out.

Q. Where did you pull your car?

A. To the southeast corner of the building.

Q. Okay. There's a sketch up there behind you, the center block being the Will Do Club. Will you point where your car was?

A. Right here.

Q. All right. What did you do when you arrived?

A. I opened the car door and began to step out because I was going to approach the rear door.

Q. Did you approach the rear door?

A. No, sir.

(p. 464) Q. Why not?

A. At the time I opened the door and stepped out, I heard a gunshot.

Q. Could you tell where the gunshot came from from where you were standing?

A. Exactly, no, but I assumed at the time that it came from the front. That's where I could see.

Q. Okay. What did you see when you came out to the front?

A. I saw Officer Rotramel standing—you want me to show you on the map?

Q. Yes, sir.

A. Approximately here (indicating), another subject later identified as Mr. Tuttle in the parking lot.

Q. About where?

A. About where the exit is.

Q. All right. Did Rotramel say anything to you?

A. Yes, sir. He did.

Q. What did he say?

A. He said, "Check his boot, he was going for something in his boot."

Q. Did you check his boot?

A. I checked it as best I could, yes, sir.

Q. How did you check it?

A. I just merely with my hand clasped the top of the boot, both boots, around the top portion.

(p. 465) Q. All right. Is that a thorough search?

A. No, sir. It's not.

Q. Is that the kind of search you normally do on a suspect?

A. No, sir.

Q. Have you ever known suspects to keep weapons in their boots?

A. Yes, sir.

Q. Why didn't you search his boot thoroughly?

A. Well, for a couple of reasons. Number one, the—to rise. He was bleeding profusely. And second, he did not appear in my opinion to be a particular threat at that moment, so I merely just grabbed the boot around the top portion to see if I felt anything at that time, and that was the best I could do at the moment.

Q. Did you stay with Mr. Tuttle?

A. Yes, sir, I did. I stayed with him until the ambulance arrived.

Q. Officer Lennox, have you in your experience—how long have you been a police officer?

A. Four-and-a-half years.

Q. Have you searched several suspects for weapons in that time?

A. Yes, sir.

Q. Have you ever missed any weapons?

A. Yes, sir. Once or twice.

Mr. Mahoney: No more questions.

(p. 466) *Cross-examination*

By Mr. Hughes:

Q. Officer Lennox, did you give your deposition on the 22nd day of March, 1982, at the offices of Freelance Reporters, 406 Park Harvey Center?

A. Yes, sir. I did.

Q. And was Mr. Gassaway present at that time and Mr. Mahoney, who sits here, present at that time?

A. Yes, sir. That's correct.

Q. And did you give your testimony under oath at that time?

A. Yes, sir.

Q. Were you sworn to tell the truth?

A. Yes, sir.

Q. And did you tell the truth to the best of your ability?

A. Yes, sir.

Q. Now, digressing a little bit, are you a graduate of the Oklahoma City Police Training Academy?

A. Yes, sir. I am.

Q. Did you go there upon your initial employment at the police department for a period of approximately 18 weeks?

A. Yes, sir.

Q. And in that training, were you taught—were you given, for example, a copy of the Oklahoma City Police Department Operations Manual?

A. Yes, sir.

(p. 467) Q. And were you told to read and to study that manual?

A. Yes, sir.

Q. And did you read and study that manual?

A. Yes, sir.

Q. And are you generally familiar with it?

A. Generally, yes, sir.

Q. And do you try to, as an officer of the Oklahoma City Police Department, are you required to follow the policies and procedures as outlined in that manual although they may be changed from time to time?

A. As best you can, yes, sir.

Q. Yes, sir. Now, when you approached the scene, I believe you said you got out of your car and you heard a shot?

A. That's correct.

Q. Then you proceeded on the diagram there in a generally westerly direction toward the suspect?

A. That's true.

Q. Is that right?

A. Yes, sir.

Q. Who you later found out to be Mr. Tuttle?

A. Yes, sir.

Q. And when you arrived at the suspect, could you see Officer Rotramel?

A. Yes, sir.

Q. Or maybe before you got there, but you came up to a point and (p. 468) time as you came westerly along that building, where you could see both Mr. Tuttle and Mr. Rotramel; is that right?

A. Yes, sir, eventually.

Q. And at the point when you saw Officer Rotramel and Mr. Tuttle, what was Officer Rotramel doing?

A. If I recall correctly, he was, at that moment he had his hand-held radio in his hand and he was talking to the dispatcher advising them to call an ambulance.

Q. Are you sure he wasn't standing there with his gun on him?

A. No, sir. I'm almost positive that he had his—he has his radio in one hand. I don't recall which hand, and he was talking to the dispatcher.

Q. In any event at some point and time, he told you to "check his boot, he was going for something," is that right?

A. I don't remember the exact words but, yes, he did ask me to check his boot.

Q. And when he said—but he said, "he was going for something," didn't he?

A. I'm not sure those were the exact words.

Mr. Hughes: Excuse me just a minute, Your Honor.

Q. Well, let's back up just a little bit. You said, as you recall, that Officer Rotramel as you first approached him was on his hand-held radio, is that right?

A. That's what it seemed to be, I believe so.

(p. 469) Q. All right. If you recall your deposition given on March 22, 1982, if you recall the following questions being asked and the following answers that you gave, beginning at page 19, line 20.

"Question: What did you do when you saw this man on the ground?

Answer: The next thing I observed was Officer Rotramel. As I proceeded down the sidewalk, Officer Rotramel was standing there north of him.

Question: What was he doing?

Answer: He was standing there holding his service revolver on the subject."

Do you remember those questions being asked and those answers being given?

A. Yes, sir. I do.

Q. And you recall that he was standing approximately at that point holding his service revolver on him 6 to 8 feet from Mr. Tuttle?

A. Yes, sir. I recall saying that.

Q. Adjacent to the front door of the club?

A. Is that a question?

Q. Yes. Is that where he was?

A. Well, exactly where in relation to the front door, he was on the front sidewalk there, yes.

(p. 470) Q. And Officer Rotramel said, "Check his boot, he was going for something, check his boot?"

A. That's what I just said. He did tell me to check his boot. I don't know exactly what his exact words were. He was going for something and he did tell me to check his boot.

Q. But he didn't tell you he was going for a gun?

A. Not that I recall, no.

Q. He didn't tell you he was going for a knife?

A. No, sir.

Q. He didn't tell you he was going for any type of weapon, did he?

A. He didn't mention a specific weapon if that's what your question is.

Q. No. He said "something," didn't he?

A. I guess he did. I don't know.

Q. Well, that's what you said under oath he said, wasn't it?

A. Yes, sir. And that's what I told Mr. Gassaway the best of my recollection, that's approximately what he said. I know that he told me to check his boot.

Q. At that moment were you acting as an officer of the Oklahoma City Police Department?

A. Yes, sir.

Q. Subject to the policies and procedures of the Oklahoma City Police Department?

A. Yes, sir.

(p. 471) Q. And at that point and time, were you concerned, as an officer of the Oklahoma City Police Department, that there might be some type of weapon in the suspect, in the suspect's boot?

A. Yes, sir.

Q. Are you familiar with the procedure, policy and procedure, paragraph 17.05?

A. Yes, sir.

Mr. Mahoney: Your Honor, I believe that's beyond the scope of direct examination.

The Court: Pardon me?

Mr. Mahoney: I object to that. I think that's beyond the scope of direct examination.

The Court: Overruled.

Q. Are you?

A. Yes, sir.

Q. And this was in full force and effect on October 4, 1980?

A. Yes, sir.

Q. And the policy and procedure of the Oklahoma

City Police Department is "thoroughly searches male suspects for weapons," is that right?

A. That's what it says.

Q. Now, in terms of responding to an armed robbery call in progress, is it a fair statement to say that you are, number one, if you do not have one assigned to you, you should (p. 472) request a backup unit?

A. That's a fair statement.

Q. Number two, you do not approach the business or residence, whatever it may be, directly in front?

A. That's correct.

Q. And you approach slowly and with caution?

A. Yes, sir.

Q. And if it's a blind building, you definitely wait for a backup, is that right?

A. That depends on the building and the circumstances.

Q. Should you wait for a backup if it's at all possible?

A. It would be a good idea, yes, sir.

Q. Now, the boots that you searched—

A. Yes.

Q. —of Mr. Tuttle's, were they cowboy boots?

A. I don't recall exactly. I believe they were.

Q. And you checked those boots that night, didn't you?

A. Well, no, I didn't actually check those boots. As I said, I grabbed the top portion of the boot around his calf.

Q. Let me ask this simpler, you wouldn't have left a man lying there alive with a weapon in his boot if the officer thought there was a weapon in there, would you?

A. Probably not.

Q. It's not a probably not, you wouldn't have done it, would you?

(p. 473) A. That again depends on the circumstances, whether or not you can conduct a full search at that time.

Q. Let me ask if you recall in your deposition this question being asked and this answer being given on page 23, beginning at line 23:

"Question: Well, you wouldn't have left a man laying there alive with a weapon in his boots if the officer thought there was a weapon there, would you?

To which you answered, 'No.'"

Do you recall that question being asked and that answer being given?

A. Yes, sir. I do.

Q. You didn't say, "Probably not," did you?

A. No.

Q. You said, "No." Isn't that correct?

A. That's correct.

Q. And you also know that you, as an officer of the Oklahoma City Police Department, are not to use a firearm except as a last resort, isn't that right, sir?

A. That's correct.

Q. Would you, sir, assume the following hypothetical to be true: One, that you had received a call of an armed robbery in progress. Two, the armed robbery in progress call related to an armed robbery in a bar. Three, that you arrived at the (p. 474) bar by yourself, entered the premises, and were advised there was no armed robbery in progress. Four, that a man fled the bar. Five, that you apprehended him or attempted to apprehend the man, and he fled from you. Would you shoot him?

A. I can't answer that directly. That would depend on what actually took place in front of me.

Q. And do you recall again when your deposition was taken on the 22nd day of March, 1982?

A. Yes, I do.

Q. Let me ask you if you recall these questions being asked and these answers being given, page 39, beginning at line 19, or line 20:

"Question: Hypothetically speaking, I'd like for you to assume these facts to be true, just as a pure hypothetical question: One, that you had received a call of an armed robbery in progress, okay?

Answer: Uh-huh.

Question: Two, that the armed robbery in progress call related to an armed robbery in a bar. Three, that you arrived at the bar by yourself, entered the premises, and were advised there was no armed robbery in progress. Four, that a man fled the bar. Five, that you (p. 475) apprehended or attempted to apprehend the man and he fled from you. Would you shoot him?

Answer: Based on those facts only?

Question: Yes, sir.

Answer: Based on that, no. I wouldn't shoot him."

Do you recall those questions being asked and those answers being given on the 22nd day of March 1982?

A. Yes, I do.

Q. And you didn't say there I can't answer those questions, did you, sir?

A. No.

Q. But if you would then continue to assume all of those facts that I gave you before and add this additional fact that he, the victim, stumbled off the side of the sidewalk and you couldn't decide whether or not he was stumbling off the sidewalk or if he had reached for something in his boot, still have had no communication between the officer and the suspect, nothing is said, no words of apprehension, such as, "halt! stop!" or whatever, the suspect merely runs from the bar. The officer goes outside and the officer observes a man, which is a judgment call as to whether he is stumbling off the curb or is reaching down for his boot. Based upon those facts, would you shoot the man?

A. Probably not.

Q. Do you recall when your deposition was given in this case?

(p. 476). A. I don't recall my answer.

Q. It was, "No." Do you recall that?

A. No, but I'll take your word for it.

Q. Let's add these additional facts: The officer said, "Halt!", and then the man appeared to stumble or to reach down in addition to the other facts, would you shoot him?

A. Here again, I don't know. I don't know what took place.

Q. Do you recall when you gave your deposition and that question was asked and you said, "No." You didn't say, "Probably not." You said, "No."

A. I may have very well have.

Q. Did you talk to anybody about coming in here and testifying today?

A. No, sir.

Q. You didn't talk to anybody from the Police Department?

A. No.

Q. Your supervisor?

A. No, sir.

Q. Nobody from the City Attorney's office?

A. No, sir.

Q. Let's say in assuming these hypothetical facts, the man bends over and he looks back, and the officer says, "Halt!," and the guy stays down and just looks at him, would you shoot him then?

A. Possibly, but I don't know.

(p. 477) Q. Do you recall in your deposition on March 22nd that identical question was asked and you answered, "No?"

A. No. I don't recall that answer, but again I say if it's there, that's what I said.

Q. Well, let's add these additional facts. The officer said, "Halt!," and then the man appears to stumble or reach down, would you shoot him?

A. Probably not.

Mr. Hughes: May I approach the witness?

Q. Would you tell the jury how you answered that identical question in your deposition on March 22nd?

A. The answer is "no."

Q. Let's say the man bends over and looks back at the officer and the officer says, "Halt!," and the guy stays down and just looks at him, would you shoot him?

A. I believe my answer was "No."

Q. You said, "no, I wouldn't shoot him," didn't you, sir?

A. I believe I did, yes.

Q. Let's say the man stumbles, falls to the ground, and gets back up, and starts running, would you shoot him?

A. Probably not.

Q. Let's say the man doesn't stumble, he doesn't reach for his boot, and just runs; would you shoot him then?

Q. Let's say the man stops, turns around, and starts running (p. 478) back at you, no apparent furtive movements of any type, just stops, turns around, and starts running straight back at you; would you shoot him?

A. No.

Q. In essence you're not going to shoot a man until you know your life's in danger, are you, or someone else's life's in danger?

A. That's correct.

Mr. Hughes: May I have just a moment, Judge. Just one, I do have one more question.

Q. Now, as I understand your testimony when you were out there on the scene, you checked that boot as best you could? Right?

A. Under the circumstances.

Q. Yes, sir. And you waited for that ambulance to arrive, is that right?

A. That's correct.

Q. How long was it before that ambulance got there?

A. Exact time I don't know. It seemed like an awful long time.

Q. And during that time, did you have occasion to observe William Adam Tuttle?

A. Yes, sir.

Q. Was he in pain?

A. Yes, sir.

Q. Was he bleeding?

(p. 479) A. Yes, sir.

Q. I believe you said he was bleeding profusely, wasn't he?

A. Yes, sir.

Q. He was shot in the back, wasn't he?

A. I don't know exactly where he was shot.

Q. But he was complaining vigorously or complaining at least repeatedly that he couldn't breathe, wasn't he?

A. That's correct.

Q. Which would be totally consistent to being shot through the lung, wouldn't it, sir?

Mr. Mahoney: Objection, Your Honor.

The Court: Sustained.

Q. Was he alive?

A. Yes.

Q. During the entire time at the scene there at the hospital?

A. I wasn't at the hospital.

Q. I mean at the scene? That's what I'm trying to say.

A. Yes, sir. He was alive.

Q. And was he — was there more than one ambulance there?

A. I don't recall if more than one came or not.

Q. Well, they only took him away in one, didn't they?

A. Yes. That's correct.

Q. These police cars that you all put people in, they have—some of them have cages in the back, don't they?

A. Yes.

(p. 480) Q. Between the front seat and the back seat?

A. Yes.

Q. And they also, as I recall, in the back seat, the door handles are removed, isn't that right?

A. Well, they're not removed, but they're not operable.

Q. Well, they're not operable anyway. So, if someone such as a widow, or soon to be a widow, was put in the back seat of a patrol car, she would not be able to get out unless someone let her out, isn't that right?

A. That's true.

Q. And do you, of your own personal knowledge, recall seeing more than one ambulance at Northwest Tenth and Portland at the Will Do Club around 8:00 P.M. on October 4, 1980?

A. I don't know if there was more than one there.

Q. At the time that ambulance pulled out that you saw them put William Adam Tuttle in, at the time that ambulance pulled out, was William Adam Tuttle still alive?

A. To the best of my knowledge he was.

Q. Was he still breathing?

A. Yes, sir.

Q. Was he still talking?

A. No, he wasn't talking.

Q. Was he complaining about he couldn't breathe?

A. At the time they put him in the ambulance, I don't know.

Q. While you were with him, he was, wasn't he?

(p. 481) A. Yes.

Q. And how long a time lapse was it from the time you left him until the time they put him in the ambulance?

A. I don't really recall, a matter of minutes.

Q. Well, you were there when they put him in the ambulance, weren't you?

A. I wasn't standing at the ambulance door, no.

Q. Were you at Northwest Tenth and Portland?

A. Yes, sir.

Q. And how far away from the ambulance were you when you put him in there?

A. I was still at the same location that he was originally when they took him in the ambulance.

Q. How long had it been since you heard him say one word, any word?

A. I don't recall.

Q. Was there any doubt in your mind that Mr. Tuttle was in excruciating pain?

A. No, sir.

Q. He was, wasn't he?

A. Yes, sir.

Q. At any time when you were out there, did you ever turn your back on him?

A. No, sir.

Q. Not on any occasion?

(p. 482) A. Not that I recall.

Q. So you were always looking at him, is that right?

A. Yes, sir.

Q. So you could tell us how far away you were from him at the time he was placed in that ambulance.

A. Are you asking where I was in relation to him?

Q. Yes, sir.

A. At the scene?

Q. Yes, sir.

A. Or at the time they actually carried him away?

Q. At the time they placed him in the ambulance and closed the door.

A. I was still where the "X" is on your map when they took him in the ambulance.

Q. And that's where the ambulance was, isn't that right?

A. No, sir. The ambulance didn't come in that close.

Q. Where was the ambulance?

A. It was on the street somewhere, I don't know.

Q. You mean it didn't even come in the parking lot?

A. It was — I think it was in the parking lot, but it wasn't up here where I was.

Q. I'll show you what's been introduced in evidence as plaintiffs' Exhibit 4-E, which appears to be a shot show-

ing approximately where the blood splatter is, which would be approximately where this "X" is, is that right?

(p. 483) A. That's correct.

Q. Now, you were in that parking lot?

A. Yes, sir.

Q. That is the parking there, isn't it?

A. Yes, it is.

Q. And do you recall where in that parking lot the ambulance pulled up?

A. No, sir. I don't.

Q. You just don't have any recollection of that?

A. No. I don't. I don't believe the ambulance came right up into the scene at all, but I'm not sure.

Q. In any event you weren't worried about him pulling a gun on you, were you, sir?

A. At that moment, no.

Q. And to your satisfaction, you felt safe?

A. Yes.

Mr. Hughes: That all.

Mr. Mahoney: I have no further questions.

The Court: You'll be excused. Call your next witness.

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(p. 248) (Recess taken)

The Court: Call your next witness, Mr. Gassaway.

Mr. Gassaway: Dr. George Kirkham.

The Court: Come forward and be sworn, please. Be seated please. I'm compelled to note that Mrs. Frank, you've apparently suffered some sort of injury. Do you know any doctors that you might be able to get some treatment from by any chance? Go ahead, counselor.

Mr. Gassaway: Thank you, Judge.

(p. 249) George Kirkham called as a witness, having first been duly sworn, testified as follows:

Direct Examination

By Mr. Gassaway:

Q. Would you state you full name for the court and jury, please, sir?

A. Yes, George Kirkham.

Q. And what is your present occupation, sir?

A. I'm an associate professor at the School of Criminology, Florida State University in Tallahassee, Florida.

Q. Are you a Criminologist, Doctor?

A. Yes. I'm a Criminologist and I also function as a police officer as part of an ongoing search I'm conducting into the field of law enforcement.

Q. And as a Criminologist, what is your particular area of expertise?

A. My particular area of expertise is law enforcement. I'm particularly concerned with police behavior in

emergency crisis situations and such subjects as the use of force this offers.

Q. As a Criminologist specializing in law enforcement, what aspect of policing has your research and teaching focused on?

(p. 250) A. Primarily on police behavior in what I call high stress situations, police behavior involving use of force, emergency response and handling of crisis situations and attempts to identify and formulate properly these procedures in respect to these kinds of conduct.

Q. Doctor, in addition to your formal education, having a Ph.D. and being a scientist or a criminologist, have you personally had some practical exposure to such subjects as felony-in-progress calls?

A. Yes, I have. For approximately 9 years now, in addition to my duties as a university criminologist and researcher, I have been involved in working as a police officer over these years in four different departments, most of the time spent in uniform patrol division in the departments, myself handling calls, handling emergencies, handling felony situations, and in the course of these 9 years as a criminologist-police officer, I've had occasion to handle a wide range of different situations, including force situations, felony apprehensions, and the likes.

Q. In addition, have you had the opportunity as a police officer as well as a Ph.D., to be involved and have knowledge, a practical knowledge and experience in arrest procedures and the proper use of police force?

A. Yes, I have. I have worked as a science criminologist. I've been involved in providing, working in the

area of arrest (p. 251) procedures and proper use of force and, also, as a police officer, I've had practical occasion to, to make arrests in many circumstances and use different degrees of force.

Q. Now, for example, so that we can kind of get down to the jury, as a police officer, have you ever had to point a loaded weapon at a felony suspect?

A. Yes, I have, on a number of occasions.

Q. Have you arrested both felons and misdemeanor suspects?

A. Yes, I have.

Q. Have you ever had to use physical force to overcome resistance to arrest?

A. Yes, I have. I think I've never had an occasion to use deadly force, but I've been on the verge of it several times, and had occasion to use lesser degrees of force, nightsticks, holds, and so forth, a number of times.

Q. So, in addition to your educational training, your doctoral training, and criminology training, you've got practical experience out there on the streets?

A. Yes, sir. I try to make ongoing—part of each week I'm now on the streets as a uniformed, do a tour of duty as a uniformed officer.

Q. Have you had occasion to train other officers in the proper police procedures with respect to the use of force and the handling of in-progress robbery calls?

A. Yes, I have. I've been involved as a trainer, worked with (p. 252) some, oh, I would say, some 50 different departments at the federal, state, and local levels

throughout the country, department training, directing training from the FBI at the federal level through state police forces, such as the Maine State Police, Virginia State Police, Florida Highway Patrol on down through large numbers of municipal and city departments.

Q. And that's teaching these officers how to handle these matters.

A. Yes.

Q. Have you published any materials relative to the use of force and other aspects of police procedure?

A. Yes, I have.

Q. Would you describe those to the jury, please?

A. Yes. In addition to being an author of a couple of books covering the law enforcement and a number of scientific articles that bear on the subject, I've also published some 20 training pamphlets, relating to properly handling of different kinds of situations, and these are used quite extensively under government grants throughout the country for the training of officers. In fact some of them are also used in other countries. Some of them, for example, are used in training the British Metropolitan Police at the Field Center in London.

Q. As a matter of fact, the Oklahoma City Police Department has (p. 253) some of your training manuals, don't they?

A. Yes. I wasn't aware of that until this morning, but I understand that they are using some of them.

Q. As a criminologist, have you received any professional honors or awards for your work in the field of law enforcement?

A. Yes, I have.

Q. Will you describe those, please?

A. Well, a variety of them. From memory, I received the second annual J. Edgar Hoover Award for outstanding contributions to law enforcement. I received the 26th annual Freedom's Foundation Valley Forge Award for contributions to the law enforcement profession, and a variety of awards from local civic and police organizations around the country.

Q. Now, you've been a little modest there. You've received the Optimist International Award for outstanding service in law enforcement, have you not, sir?

A. Yes.

Q. And you received an award of recognition for outstanding service to law enforcement nationwide, is that correct, sir?

A. Yes. From the Reserve Law Officers Association of America.

Q. And you received an award for outstanding contributions to law enforcement education in the American justice system, have you not, sir?

A. Yes, sir.

Q. And in fact a scholarship fund, FSU, Florida State University (p. 254) has been established in your name, is that correct?

A. Yes, that's correct.

Q. And you've received an award of appreciation and recognition of outstanding service on behalf of the municipal police in the State of Ohio, is that correct, sir?

A. I think in a variety of states, Ohio, Florida Association of Chiefs of Police, Metropolitan Police Department of Toronto, and a number of organizations like that.

Q. Perhaps I skipped over—where do you live, Dr. Kirkham?

A. I live in Tallahassee, Florida.

Q. And do you teach at the university?

A. Yes, I do. I'm an associate professor there on the faculty of the School of Criminology.

Q. Okay. Have you had some individual—I guess some of the awards that we talked about came from law enforcement organizations themselves, have they not?

A. Yes, they have.

Q. And has your work and your contribution to the field of law enforcement received public recognition in recent years through the mass media?

A. Yes.

Q. Tell the jury briefly about where you've been covered.

A. Well, briefly, CBS 60 Minutes with Dan Rather did a segment on me a few years ago. I've been on Good Morning America a couple of times, NBC's Tomorrow. Newsweek did a feature (p. 255) story on me a few years ago; Time, US News and World Report, Readers Digest, People, National Inquirer, a variety of different things around the country.

Q. Has your work in the field of law enforcement been publicized and your writings distributed among international police communities?

A. Yes. Some of my works as I mentioned on training are used by the British. Some of my works have been printed in other languages in other countries, ranging from law journals, law enforcement journals, for example, Interpaul, which serves the national police community has reproduced some of it, police journals in countries ranging from Germany, India, even the Soviet Union have reproduced one over the years.

Q. Dr. Kirkham, how old a man are you?

A. 40. Just turned 40.

Q. And are you a married man?

A. Yes. My wife is a detective, fulltime detective for the Calhoun County Sheriff's Department.

Q. Do you have children?

A. Lots. I have 4.

Q. And I believe you testified that you teach out at Florida State University. In what school are you a professor?

A. Well, I teach in the school of criminology at Florida State University primarily in the field of law enforcement. Most of these courses are related to police. Then, of course, I (p. 256) teach in training academies as requested by departments around the country.

Q. And at present, are you a fully-sworn police officer?

A. Yes. I am a regular, police-sworn officer. I work on a part-time basis, most of the time on the nature of my university research I do work, but I normally—as I say, sometimes during the summer I work fulltime, full-

time as a patrolman, sometimes also during holiday breaks, but during the normal year, I always manage to work at least a tour of duty a week, usually on the weekend.

Q. And have you appeared as an expert witness in courts of law before?

A. Yes, and I've functioned as a expert witness to date in about 30 states at the federal and state courts in cases involving, some 125 cases involving police officers, most of them centering on the use of police firearms, questions of excessive force, deadly force, and questions of proper or improper use of police force being reported.

Q. And are you exclusively—do you exclusively testify for plaintiffs?

A. No, no. I spend—it covers between, between 50 and 40% of my time testifying in behalf of police departments. For example, upon leaving here today, I go to Miami where I am taking, doing a deposition in relation to, on behalf of the police department with whom I'm working on a case.

(p. 257) Q. You have been a member of the Board of Directors of the Americans for Effective Law Enforcement, is that correct?

A. Yes, I was. And I was also recently elected Executive Director of the American Certification Board of the National Academy of Police Specialists.

Q. And you are a member of the Board of Directors of the International Law Enforcement Stress Association.

A. Yes, that correct.

Q. And you were the Director of the 1978 National Conference on Stress in Policing, is that correct?

A. Yes, that's true.

Q. And have you served as an instructor, lecturer, or consultant for the New York City Police Department?

A. Yes.

Q. NBC News?

A. Yes.

Q. Detroit Police Officers Association?

A. Yes.

Q. Philadelphia Police Department?

A. Yes.

Q. Pennsylvania State Police?

A. Yes.

Q. Virginia State Police?

A. Yes.

Q. Maine State Police?

(p. 258) A. Right.

Q. Yonkers New York Police Department?

A. Right.

Q. The Police Officers Association of Michigan?

A. Yes.

Q. The Albuquerque, New Mexico Police Department?

A. Yes.

Q. Cincinnati, Ohio Police Department?

A. Yes.

Q. The Dayton, Ohio, Police Department?

A. Yes.

Q. Roanoke, Virginia, Sheriff's Department?

A. Yes.

Q. The Metropolitan Police Department of Toronto, Canada?

A. Yes.

Q. You served as an instructor at the United States Military Police Training Center, Fort McCalla, Alabama?

A. Yes.

Q. And you served at the United States Treasury Department at the Consolidated Federal Law Enforcement Training Center?

A. Yes.

Q. And for the FBI?

A. Yes.

Q. At Quantico, is that right?

A. That's right.

(p. 259) Q. And you served as a consultant to the Northwestern Traffic Institute?

A. Yes.

Q. And North Carolina Law Enforcement Officers Association?

A. Yes.

Q. Florida Sheriffs Association?

A. Yes.

Q. State of Indiana Fraternal Order of Police Association?

A. Yes.

Q. And it could go on and on, can it not, sir?

A. Yes.

Q. I've got a list here of probably 20 more departments?

A. Yes, a number of, quite a number of departments.

Q. And have you worked as a Research Criminologist in the Systems Analyses Division of the Stanford Research Institute?

A. Yes, I have.

Q. And have you been the Project Director of Research Associates for the Center of Interdisciplinary Studies at the California State University?

A. Yes, I have.

Q. And have you been the Consulting Editor for the Journal of Police Science and Administration?

A. Yes.

Q. And you have been the Editorial Consultant for Harper and Rowe Publishers in Police Science, is that correct?

(p. 260). A. That's true.

Q. And that list could go on and on, too, could it not, sir?

A. Yes.

Q. And some of your educational films dealt specifically with police civil liability and negligent operations by police officers, is that correct?

A. Yes. It's a series of six films that cover the spectrum of police civil liability, and among others, things that address arrest, improper use of deadly force, intentional negligent use of firearms and excessive force generally.

Q. And you've had several books published also I believe you said, is that correct?

A. I have two books in print at the present time, yes.

Q. And you've been published in legal journals, including the Barrister, which is the National Law Journal, is that correct?

A. Yes, that's correct.

Q. And you've received research grants, is that right?

A. Yes, I have.

Q. Specifically in training municipal police in relation to emotional control skills?

A. Yes.

Q. And training correction personnel in stress management techniques?

A. Yes, that's correct.

Q. And you've received many academic honors also, is that (p. 261) correct? I don't need to go through all that.

A. Yes.

Q. Have you had an opportunity to examine certain materials in reference to this case that you're here in court about today?

A. Yes, I have.

Q. Would you describe the materials that have been provided to you?

A. Yes. A variety of materials pertaining to the shooting occurrence on the night in question, depositions of Officer Rotramel, I believe, other police officers responding to the scene, detectives, general police reports, rules and regulations of the Oklahoma City Police Department, medical examiner report, diagrams, photographs. I've also had an opportunity with yourself to go to the scene last evening, something I always try to do in any case I become involved in. So, generally those are the things that come to mind.

Mr. Gassaway: May I approach this witness, your Honor?

Q. Dr. Kirkham, I'll hand you what's been marked for identification purposes, plaintiff's Exhibit No. 8 and ask you if you've had an opportunities to review that document?

A. Yes, I have.

Q. And what is that document, sir?

A. This document is in my understanding a copy of the training curriculum that was in effect at the time Officer Rotramel (p. 262) went through the Police Academy.

Q. Okay. And you have had a chance to review specifically 9.03 of the Oklahoma City Police Department Operations' Manual, is that correct?

A. Yes, I have.

Q. And 17.05?

A. Yes.

Q. And of the particular pages that we feel are important in this case?

A. Yes.

Mr. Gassaway: Move to admit plaintiff's Exhibit No. 8, Your Honor.

The Court: Without objection, will be admitted.

Q. Shall I call you doctor or officer?

A. You can call me, George, if you like, doesn't matter.

Q. You've also had the opportunity to examine the exhibits that have been introduced in the trial here today?

A. Yes, sir, I have.

Q. Including actual photographs of the scene as it was depicted on October 4, 1980, the date William Adam Tuttle met his death?

A. Yes, that's correct.

Q. On the basis of your analysis, have you been able to formulate an opinion as to the extent in which Officer Rotramel's conduct on the night in question conformed to (p. 263) well-established police procedures and the principles of police conduct?

A. Yes.

Q. And what is that opinion, sir?

A. My opinion is, and I believe I can best express it this way, that in probably between 40 to 45 shooting cases that I've been involved in, this is the worst departure from acceptable, universal in this country, standards of police conduct relating to the use of deadly force, worst case I've ever seen or been involved in.

Q. Did the conduct arise to, of the defendants arise to gross negligence?

A. Easily to gross negligence.

Q. Did it rise beyond gross negligence in your opinion?

A. Far beyond the scale of gross negligence, quite frankly, and in reading the documents, why my first question was, wondering what had happened from the criminal standpoint because the conduct was shocking.

Q. What is the basis for your opinion and conclusions?

A. That, very briefly, that there was no, and I would emphasize it as a police officer, preparing police officers, trainer of police officers, I would go to the inth degree to see an officer's side of things, but even doing that, in laying down the evidence which I have tried to do, there was no, there was no remote justification for shooting this man in terms of (p. 264) proper police procedure. There was no — first, there was no, no good faith belief, could not possibly have been a shadow of any belief that a felony had occurred, robbery in this case,

at the point at which he shot him, and that this man had perpetrated a robbery. There was no remote basis for believing that this man was a threat to Officer Rotramel or anyone else at the moment in which he was shot. And finally, going all the way back as far as we've had law enforcement officers, there's always been the expectation within the most moving shooting situations that an officer is expected to be reminded of this good regulation that an officer would first exhaust, attempt to exhaust at least lesser means with respect to the use of force, but here I see no evidence of any exhaustion of lesser means. As I say, it's just — it's almost an unbelievable shooting occurrence. I have no wish to add to the mental anguish of the officer. I'm sure he feels generally bad about what happened, but it's a terrible, terrible occurrence and one that I think was preventable through proper training and supervision.

Q. Let me ask you that, in your opinion what was the cause of Officer Rotramel's violation of well-established principles of police conduct on October the 4th, 1980, which resulted in the death of William Adam Tuttle.

A. Well, there was a series of departures, so many departures from well-established principles of police conduct that it (p. 265) came to me, inevitably, the conclusion that the officer was not properly trained, was not able to handle that kind of call, that kind of occurrence on his own. For example, I can speak to some of these things if you like — the way in which the call was handled. It is as basic as putting on shoes in the morning to come here to a police officer, that a felony in-progress call is never dealt with by, by one officer when there's back-up units available, where there are back-up units available. And from my reading of Officer Rotramel's deposition, he seemed to

be unaware of this fact. If indeed had there been a robbery in progress, he would have been a prime candidate to become an officer fatality statistic. He merely walked into the situation, did not wait for the back-up units en route to him. There was no car-to-car coordination, communication. He pulled up directly in front of the place. These are all things that are in a tight, troublesome locations, training locations that are to be emphasized and re-emphasized. He plainly did not understand these things.

Q. Doctor —

A. And —

Q. Dr. Kirkham —

A. Yes.

Q. If Officer Rotramel was not trained to wait for a backup and was not trained in how to handle a blind building situation, (p. 266) would you, based upon the examination of all the materials that you've had, find that the training was grossly inadequate and so reckless that police misconduct was inevitable?

A. Yes, I would say so. He was not trained in certainly the three "R"'s, which are very basic essentials of police conduct. You don't put someone out on the street with the power of police officer responsibilities, not being certain they understand, basically, some things should be left to experience, even trial and error, but not the handling of a felony situation, a robbery in progress. And, again, there's a very well laid out curriculum that is used through out the country for this kind of thing, and even a review of the existing training curriculum of the department at the time, I note that there was only 24 min-

utes devoted to robbery in progress calls, and these are statistically one of the most dangerous calls that an officer has to handle. Obviously this material was handled in a slipshod, hurried fashion. While the department's rules and regulations concerning the use of deadly force are good and sound and consistent with ones established around the country, there is a need to, to go beyond this in making officers practically aware of how you handle different types of situations. Now granted the fact that you can't prepare a person for every, every robbery, every burglary, every car accident, but you prepare (p. 267) them in terms of general principles so they know what to do and what not to do and this young man obviously was not prepared adequately and was not able to function on his own.

Q. Now you mentioned some of the curriculum of the robbery scene response being 24 minutes according to the curriculum as originally introduced in one of our exhibits, is that correct?

A. Yes.

Q. And the curriculum indicated that they had firing ranges training of 80 hours, is that correct, sir?

A. Yes. And of course it's fine for officers to know the, and important for them to know the mechanics of firearms use, but it's also important for them to understand from the practical standpoint, the circumstances in which one uses firearms, in which one prepares to use firearms, and these things apparently were not gotten across. The — I note that apparently, I see in Officer Rotramel's deposition, they used two very excellent training films that are used widely around the country, "Shoot, Don't Shoot," Parts 1 and 2, but that's not enough. And no police

department that I'm aware of simply shows these two films which present different types of shooting situations. At least at that there's a need for supplementary instruction. There were so many things that were, that were departures from accepted police procedure, going in by himself when he had backups coming, parking (p. 268) directly in front of the building —

Q. Now did you find from his sworn statement that Officer Rotramel testified that he parked his police vehicle directly in front of the front door?

Mr. Gassaway. May I approach the witness, Your Honor?

Q. Referring your attention to a very rough drawing behind you, Dr. Kirkham, this being the front door, (indicating on drawing) north, west, east and south, this being the front door of the Will Do Club. He parked his vehicle directly in front of the door. What, if anything, do you find improper about it?

A. Again, are many, many standard works that address this. Virtually everywhere around the country it is taught to my knowledge that an officer, first you never stand in front of a door where you have a possibly dangerous call. Even a domestic disturbance can be dangerous. And, secondly, you never, never pull a police vehicle directly in front of one for the simple reason that you don't want to telegraph your approach to the call that could be, in this case, an armed robbery in progress. You want to approach at a side angle. You want to do a surveillance of what exits there are, where are they located, are there any windows you can see in and what would be called-for procedure in a situation for the officers to set up or the most

likely escape route? In this (p. 269) case it may be adjudged to be the front door that the person is most likely to come out of. You set up at a safe distance from there, against trying not to telegraph his approach and coordinate over the radio with other units, saying I'm covering the location, and I'm covering the east end, and one possibly covering the west and when you've got the place secured, then you would approach in a force, with a tour in force, a number of officers. Studies have shown that the probability of resistance of an armed suspect, had this been an armed robbery, is directly proportionate to the police manpower on the scene. In other words, the less the manpower, the more likely this would be a shooting situation, the less likely that the personal will surrender. So, there are quite a number of departures from sound, established police practice. I think clearly they go to training and supervisory deficiencies.

Q. Let me ask you this, Officer Rotramel testified that he did not look for alternative entrances or exits. What, if anything, do you find improper about that?

A. Well, it was a departure from established police procedures in that he did not do that, uh, increased the danger to him in terms of — there could have been, for example, if you don't — if you check out an area closely, there may be a better route of entrance. There may be some aperture or opening or window by chance in a blind building, something (p. 270) you could see in. There could be a lay-off man waiting in another car, parked at the side who was going to shoot you when you walked up if you're not paying any attention to what's going on around you. So, officers are trained to, to take in the whole situation and not, above all, not to jump the gun, not

to rush in, in this — indeed, I have found in my studies of officers shooting people and officers being shot, that the common denominator is jumping, jumping a call, or jumping into a situation without, without waiting. I think intelligent policemen are, are supposed to be, take charge, don't rush into things, and try to train them, condition them to realize not to do that, slow down, wait for the backup, find out what's going on, and we try to train them out of this kind of response.

Q. Now, Officer Rotramel testified that he did not have any training on how to secure, or handle a blind building situation, blind building being the front door shut, no means of looking inside of the building. If he did not receive any training, would you find that to be grossly inadequate?

A. Yes. He should have received specific training on the approach to buildings with possible felonies in progress. This would cover not only robberies, but burglaries as well, how to, how to set up on a building, how to position himself, the question of waiting for backup. There is clear indication from his deposition he does not recall any (p. 271) specific instructions, and that would be a glaring departure if you are — in fairness to the department, I've looked at their curriculum trying to see where this kind of material might have been covered. Sometimes it dealt with under patrol procedures, but in the breakout of the, the hours, I don't see where they, where they covered this material. And it's extremely basic and I'm astonished because there is, the policies are good policies.

Q. Now, Officer Rotramel testified that he wasn't trained to go into a situation with a gun drawn when he was responding to a call of an armed robbery in progress. Do you find that this lack of training would be so grossly negligent or reckless, reckless so that policemen misconduct or shooting would be the inevitable consequence there?

A. Yes. In an officer's response to a felony-in-progress situation, there's always discretion in terms of, to some degree in how an officer handles a situation, every situation being different. But an officer, for an officer to approach the situation like this, first, without backup is bad and, secondly, to approach it without a drawn weapon — I can't conceive approaching a robbery-in-progress call without, without have a a weapon drawn or in a ready-to-draw position, or ready to walk, walk into a place. There are, there are specific techniques of entrance where you think you have a in-progress call — I won't get into the mechanics—(p. 272) but they're taught commonly in training curriculum.

Q. Now, you are aware, are you not, that at the time of the shooting of William Adam Tuttle in the back, Officer Rotramel had been out of the Academy approximately 10 months?

A. Yes.

Q. And testimony from Captain Delaughter, who was the patrolman, who was the acting chief of police on the night of the incident, indicated that although an officer is on a probationary period for one year after he's out of the academy, the shift commander can, at his discretion allow him to ride without a supervisor after four,

five or six months, but there wasn't any checklist of any sort to check him off to make sure that he's competent to do that. What, if anything, do you find improper about that?

A. Yes. There should have been within the department — again this is used quite widely in departments of this size throughout the country — what is called the "FTO," program, or the "Field Training Officer" program that is, that is well structured. Basically what it involves is you take a young man or woman who is going to be a police officer who has been carefully selected, we hope, and you just don't let them ride with someone, you put them with people who are, based on past conduct and experience, are the best trainers that you've got, and you have those officers — the senior officers are called FTO's or field training officers—function as it (p. 273) were as supervisors of those people in charge and check them off, on everything from soup to nuts, check them off on response to a progress-type call, prowler calls. If you see the officer doing something, you say, Charles, don't stand in front of the door, don't park your vehicle like this, let's go back. Let's try this. Let's do this. You check them off on all these kinds of critical areas, and then at the end of a — it's common, for example, for this FTO period to be six months and for a person to be cycled through several different FTO supervisors, so they get a smattering of different perspectives — but at the end of this period of time, then and only when it's clear they're signed off on of all of these things, that are the practical side of what they formally learned at the acadeamy — there being no substitute for practical

experience — then they're allowed to go on their own. And if their response is apparently someone is not up to snuff in some areas, they're having trouble with car stops or something else, you don't put that person out on their own because something could happen to them. They can be injured. They can be killed. They can make serious mistakes in the field of the sort that we see here.

Q. Based upon your examination of all the sworn statements of the police officers, and depositions of the police officers, and the depositions of the witnesses, Vonnie Hinds and Beverly Hayes, did you find that defendant Rotramel on the (p. 274) night of October 4, 1980, to the best of his ability, tried to make the arrest of William Adam Tuttle without violence?

A. No.

Q. Okay. Did you find that there were means, other means of apprehension exhausted prior to the shooting of William Adam Tuttle in the back?

A. No, there weren't. Again this goes to another, another deficiency here. I recall in Officer Rotramel's deposition where it was posed to him, what, you know, could you have done something else if someone was attacking, and the only thing he could think of was maybe he could have hit him with a flashlight. There are many things. You had backup units coming in. There's the possibility of foot pursuit. You've got radio communication with other officers who could be beneficial in, you know, other positions in an attempt to apprehend him. There are all kinds of things and judging by what I understand to be the shooting range and the position in which he was shot at the time the officer stepped out of

the bar, there was just no remote exhaustion of those means, exhausting of other means.

Q. And William Adam Tuttle was not a fleeing felon on that night, was he?

A No, nor could I think any police officer reasonably would believe that he was.

Q. And could you categorize him as a misdemeanant?

(p. 275) A. Yes. He was in my understanding of the municipal ordinance, he was someone who, who had violated a municipal ordinance of refusing to obey the lawful command of a police officer and making a false report but, you know, again when a police officer, even if you allow this was, initially went out as a very bad call, a robbery-in-progress call, when a police officer, when you have had an occasion to enter an establishment, when you enter a place under suspicious circumstances like this, setting aside the content of what the barmaid told the officer that everything was okay in here, you can tell from the, the expression of people, the behavior of the people that there's something wrong here, as the case of the, the person who comes to the door and they say, yes, officer, everything's all right. You can see all over their face they are tense, they are frightened, maybe someone has a gun on them, but in these circumstances, there were 6 to 10 patrons in there going about their thing. This man had a drink. There's no way, there's no way in my wildest thought, imagination that an officer could believe upon seeing that and hearing what the barmaid said that there was anything amiss in there in terms of a felony.

Q. Do you also take into consideration that the decedent had a drink in his hand when he came up to the officer?

A. Had a drink in his hand as well.

Q. Is that in any way consistent with being an armed robbery (p. 276) suspect?

A. No, that, that would not be consistent with suspicious behavior on the part of an armed robbery suspect.

Q. In all of your travels, and all of your consulting, and teaching, and publishing, and appearances and testimony is there anywhere in the world that you know of that a police officer is justified for shooting a misdemeanant?

A. No. It goes all the way back to common law that a police officer is never justified in taking the life of a misdemeanant. Once a person becomes a felon, that is to say, someone who is a misdemeanant doing something in a bar, committing simple assault and suddenly grabs a, a gun or knife and pulls it out, transforms itself into a felony. So there's no—shooting of a misdemeanant is universally prohibited, and indeed is declarative in the policies.

Q. Now you are aware that Officer Rotramel testified that the decedent, although it's been contradicted, that the decedent made a move to his boot although he never pulled his pant leg up, you are aware of that?

A. Yes. I'm aware of the allegation he made a couple of different movements toward his boot.

Q. Based upon that and based upon the fact that Officer Rotramel never saw an offensive weapon, real, fake, or otherwise, would he have been justified in using deadly force as a last resort situation at that point?

(p. 277) A. No, not at all. At that range, and then I've had occasions to have firearms on people at least

three cases I can think of, ready to fire situations, at that range with a man's back to me at 8, 10 feet, it wouldn't matter how tense I was or if he was wider, with a revolver, in a ready-to-fire, raised position, there is absolutely no way that he could come out of there. If he could get his pant leg up over his boot and reach down, there is no way that he could come up with a weapon and point that weapon where I couldn't shoot him, amply shoot him before he had an opportunity to turn. I could shoot him several times. Any police officer could. So, there was, as I say, there was no remote threat and of course there was no weapon seen.

Q. Now, Officer Rotramel testified to this following:

"Question: You can't shoot a man that's running from you when you haven't seen an offensive weapon, can you?

Answer: No.

Question: An offensive weapon could be a gun, a knife, perhaps a multitude of other things that cause bodily injury or death, is that correct?

Answer: Yes.

Did you see an offensive weapon in the attempted apprehension of William Adam Tuttle on the 4th (p. 278) day of October, 1980, at a location at approximately Northwest Tenth and Portland outside the Will Do Club?

Answer: No.

And you shot William Adam Tuttle that night, did you not?

Answer: Yes, I did.

In your capacity as a police officer?

Answer: Yes."

Is a shooting justified in any circumstances that we have here, any remote circumstance, if you have not seen the weapon?

A. No. If we know that there is no present ability to apparently harm anyone, there's no immediate threat of death or any bodily injury to anyone, there's no remote belief that a felony exists and there's no reason to believe that a felony exists, what you've got is a shooting of a misdemeanant, someone fleeing from a command to halt, someone inadvertently or strangely, or whatever but, good lord, that's no basis for shooting him.

Q. Now, the defense in this case is that William Adam Tuttle was trying to get the police officer to kill him, that it was a suicide. Did any of the statements, sworn depositions, or any other material you have indicate that the deceased baited the officer in any way into shooting him?

(p. 279) A. No. The decedent did nothing in this circumstance that would justify the officer's shooting him. Now, there are well-documented cases, and I've seen a number of them along as a police officer, in research about people who are subdimensionally suicidal, again, the number going to see a psychiatrist. I'm not one, but there are people who engage in self-destructive kinds of conduct, but even if one hypothesizes that was this man's, in his disturbed—

Q. Let me stop you there. Let me stop you there. Let's assume, just for the sake of arguendo, that William Adam Tuttle was trying his best to get killed by the police officer and he was doing his best to get killed, but we have the same fact situation at most, we have movement to the boot for a gun with no pants' leg coming up, no reaching into a boot, no visibility of a weapon, would that officer be justified in shooting that man even if he was trying to commit suicide?

A. No. No. And of course the police have, a police officer—they frequently deal with people who are mentally disturbed or self-destructive, and they are under an obligation not to, not to facilitate their self-destruction, so there would be nothing, there would be no justification for, for shooting under those circumstances. Now the, if a man—and I have, you know, have had cases where—anytime a police officer sees a gun, somebody pulls a gun, begins to move on him—I'm on the other side of the table when he does. If the, the (p. 280) police officer reasonably believes for a moment that his life or the life of another person is in danger, my response to them is to shoot and protect yourself at all cost. But we're not dealing with that kind of situation or any remote fraction of it.

Q. He didn't see a weapon, did he?

A. He did not see a weapon.

Q. There's no way of any reason, method, or otherwise that you would justify the shooting, is that correct?

A. That's quite correct.

Q. Now, Officer Rotramel testified that he was not adequately trained to handle the situation he got himself into. Would you agree with that?

A. I'm afraid that's the truth. I'm afraid he was not—he was in over his head. He was a young man, inex-

perienced, and not properly trained, and did not have proper supervision in the past. You have the chemistry of that and this poor man coming together that lead to this event.

Q. Should the officer have yelled, "halt," or, "stop," or, "you're under arrest," before he ever drew down on that man if he had not seen that weapon?

A. Well, the officer should have after, after seeing the weapon, he should have either issued a command or a series of commands to halt, stop.

Q. Loud enough for everyone to hear?

(p. 281) A. Oh, yeah. I mean, it's not uncommon for a police officer, as a police officer, to use that when shoplifters are running, and an officer simply shouts and has no intention of even drawing a gun or shooting, but shouting at a person, "stop, or I'll shoot," to get them to stop. So in these circumstances, the officer certainly should have done that, but in my reading of the facts, there was no, he really did not exhaust any of these kind of means he could have used to try to effect this apprehension.

Q. Does a police officer have a right to shoot a potential felon?

A. No.

Q. Now, the officer testified that he saw, while he was standing, that the bartender, and Officer Rotramel, and the dead man were standing there by the door, that the, that William Adam Tuttle made two moves for his boot. What should a police officer do if in fact the police officer had any suspicions there was a weapon on the man at the time?

A. He — yes — nothing — that's inconsistent in the search of my mind in the reading of the facts. As a police officer, any time you're in a suspicious situation, possible felony situation you believe might be, you've got someone reaching for a boot, or a bag, or something like that you think could contain a weapon, there's only one universal response, and that is, you draw them out. You place them on the wall, and (p. 282) you make darn sure what's in that, what's in that boot and that bag for your own protection, and so, if you believe that, that's what you do. You don't ignore it. It would be foolhardy to do that.

Q. Okay. Now, Officer Rotramel stated that it would be more probable than not that if he had been adequately trained, William Adam Tuttle wouldn't have been shot. He would be alive today. Do you agree with that?

A. I think that's true. If he had been properly trained and supervised, the occurrence would not have taken place.

Q. And could he have been adequately trained for that situation?

A. Yes. Could have been, should have been.

Q. Should he have been taught differently as to how to respond to an armed robbery in progress working it as a single as opposed to working it as a partner?

A. Yes.

Q. Should he have been taught how to proceed into a blind building?

A. Yes. He should have been.

Q. Should he have had training in securing a blind building?

A. Yes.

Q. Should he have had training on when to wait for a backup in responding to a call of this particular nature?

A. Yes. All those things.

Q. Based upon your examination of the statements in this case, (p. 283) should he have had a supervisor riding with him?

A. He should not have been in a solo car, based on everything we've seen and his lack of understanding on how to handle these things, because an officer riding by himself at any moment might bump into just this kind of situation. You don't, you don't take their training wheels off until you are sure they can handle the full range of things as they come up.

Q. Now, you are aware, are you not, that Officer Rotramel testified that after the shooting, a memo was passed around with the headline on it "Oklahoma City Police Officer versus William Adam Tuttle—we aim to please."

Mr. Mahoney: Objection.

The Court: Sustained. Counsel, there's been no evidence to that effect in this case.

Mr. Gassaway: All right. I'll get into that at a later time, Your Honor.

Q. I believe you've gone over the curriculum, and I believe you've testified that there was about 80 hours of firing range practice.

A. Yes.

Q. And did we find that there was over 50 hours in physical education?

A. Yes, I think there was.

Q. And over 40 hours in public relations in urban communities?

(p. 284) A. Yes.

Q. And 40 hours in first-aid?

A. That's what I recall.

Q. Thirty-six hours in criminal law and penal code?

A. Yes.

Q. And 34 hours in psychology of personal adjustment?

A. Yes.

Q. Thirty hours in report writing?

A. Correct.

Q. Thirty hours of auto accident investigation?

A. Yes.

Q. And 20 hours of traffic ordinances?

A. Yes.

Q. Fourteen hours of military drills?

A. Yes.

Q. And 13 hours in hand-to-hand, self-defense type courses?

A. Correct.

Q. Ten hours of minority relations?

A. Yes.

Q. Eight hours of in city geography?

A. Yes.

Q. Six hours in the history of law enforcement?

A. Yes.

Q. And on down the line as it goes down, and we found one portion of one course entitled "robbery scene response?"

(p. 285) A. That's correct.

Q. And that was a two-hour course, divided into five different subjects, is that right?

A. Yes.

Q. Assuming that "robbery scene response" got an equal amount of time as the other four, would that not be a total of 24 minutes training in robbery scene response?

A. It would be a very, very small fraction.

Mr. Gassaway: May I have one moment, please?

Q. Purely for explanation purposes, would you explain to the jury the difference between a felony and misdemeanor?

A. Yes. A felony is—it is a crime, very specific crime involving a great magnitude involving a serious misconduct. Normally it is punishable by imprisonment for a period exceeding a period of a year and beyond, and a misdemeanor is a minor transgression, something that does not warrant the kind of, the kind of response to the action a felony does. So that there is a difference in magnitude between the two crimes.

Q. And would a misdemeanor merit execution?

A. No. A misdemeanor never, never, warrants the use of deadly force regardless of the nature of the misdemeanor.

Q. And would execution be an adequate or adept term in categorizing William Adam Tuttle's death?

A. It's a horrible term to use but sadly this case falls in that (p. 286) kind of category because it comes in that curbside kind summary judgment, curbside execution of someone who had committed a misdemeanor.

Mr. Gassaway: That's all.

The Court: Mr. Mahoney.

Cross-Examination

By Mr. Mahoney:

Q. Dr. Kirkham, you were talking about all the police departments that you worked with or had association with. Have you had association with the Oklahoma City Police Department?

A. No, sir. I never have.

Q. Are you familiar with any of their training activities?

A. I've not been to their academy. I've only had a chance to review their training curriculum. I understand they use some of my training materials, but I'm not familiar even with the police academy.

Q. Have you spoken with the instructors out there?

A. No, I have not.

Q. Have you spoken with anyone connected with the academy in the training division?

A. No.

Q. The only thing you've seen connected with the Oklahoma City Training Department is that curriculum in front of you?

A. That is correct.

(p. 287) Q. And based on that, you're willing to condemn the complete training facility of the Oklahoma City training?

A. No, I'm not trying to condemn the academy training as a whole. I'm saying that based on the officer's conduct and my reading of the curriculum, that there has to be a connection between the two in my mind based on what the officer did. There are deficiencies apparently in the curriculum, maybe fine in the ultimate respect.

Q. Are you aware of any other instances other than the one involving Julian Rotramel with the Oklahoma City Police Department?

A. Any other shooting instances?

Q. Yes.

A. No, I'm not.

Q. So based on one shooting incident, you believe the training is faulty?

A. I believe the training in these areas based on on what we've said here today is grossly deficient.

Q. On that single shooting?

A. On the basis of the single shooting, yes. I think it's a major hole.

Q. Dr. Kirkham, are you aware of the state requirements for police training of police officers in Oklahoma?

A. I'm aware that it varies from state to state. I'm not aware specifically of how many hours Oklahoma requires as a state (p. 288) right now.

Q. Do you know how many hours of training that the Oklahoma City Police Department trains their recruits?

A. I'm not aware of the total number of hours.

Q. All right. If I were to tell you the total number was 700 hours, would that seem sufficient compared to other training academies?

A. If the, if the total training time is 700 hours, I'd say it is a good number and one consistent with probably departments of this size, though that doesn't speak to the content of what's being taught.

Q. Are you familiar with Tom Hagee by reputation or do you know him?

A. I'm sorry, with whom?

Q. Tom Hagee?

A. I do recognize the name. I can't place it.

Q. All right. Now, Dr. Kirkham, which depositions were you supplied with for your developing your opinion here?

A. Well, I don't have a list of them with me, but the deposition of Officer Rotramel, of course, deposition of witnesses, Mrs. Hinds, other witnesses, police officers re-

sponding to the scene, the investigators who were involved, quite a number of police depositions. I'd have to have my list here to be able to enumerate.

Q. Okay. Were you given any depositions in their entirety?

(p. 289) A. Yes, I believe so.

Q. Did you read the deposition of Officer Rotramel in its entirety?

A. Yes, I did.

Q. Do you recall anything in that deposition of Officer Rotramel telling the suspect to stop?

A. I recall Officer Rotramel making, using the expression hollered, saying something about hollered, but I'm also aware from reading of the depositions of other principals that they heard no such command, so I think it's a mute point as to what happened there.

Q. All right. I believe in direct you stated that sometimes in a armed robbery situation, a witness may say one thing but the expression on their face may tell you another, is that correct?

A. Yes, as I pointed out, it was one of the things to look for in dealing with anyone as a police officer.

Q. Okay. Now is this a subjective evaluation, or can an officer be trained to learn the expressions of people?

A. Well, you train officers, we train officers specifically to learn what we call body language, to look at a person's face and bodily mannerisms to see if it's consistent with what they're telling you. A person may be, lying, for example, at a traffic stop, tell you it's their car,

but their face is, they're tense or frightened, and you learn to (p. 290) read peoples' faces in a sense.

Q. If someone, if Officer Rotramel in this situation asked the bartender if there was a robbery going on and she told him there was not, could her expression indicate something different?

A. Her expression would have to be one thing to be considered. Obviously if she looked terrified, and she was standing in a position where someone could, could have a weapon on her, for example. But the other thing here is the atmosphere of the bar itself where you've got a number of people in there, either drinking or going about their business; you just, you just could not conceivably believe there was a robbery-in-progress stage. When you put all of this together the officer could not—

Q. Okay. Dr. Kirkham, are you aware that Vonnie Hinds was the bartender?

A. I believe that was the name.

Q. Are you aware that in Oklahoma she is required to have a bar card to work in a bar?

A. Yes.

Q. Were you aware that it was expired when the officer came in?

A. I recall it being expired at that time.

Q. Were you aware that she thought that Officer Rotramel was coming in to check her bar card?

A. I recall a statement to that effect, that she asked someone (p. 291) else to step back.

Q. Now, could this change her expression or demeanor in response to the way Officer Rotramel could interpret her response?

A. Well, there is a difference between a person who does not want to see the police there in terms of like a motorist that is speeding and someone telling him to stop or something, and a person who—I have seen a look of terror on someone's face who's been, been threatened by a violent crime. It's a different kind of thing in view of the evidence of the officer, even an experienced officer, properly trained, that—

Q. An officer could tell if something was amiss though, couldn't they, might be able to tell?

A. Well, the officer I think would have gotten the impression from Mrs. Hinds that perhaps she was not happy about his presence there, but there would not be any of the appearance or mannerisms that one would associate with a felony in progress.

Q. This would be a subjective evaluation of the officer?

A. This is a subjective evaluation.

Q. There's no way that anyone could tell exactly what an officer could interpret today, twenty months later, could they?

A. No. You just provide the general diagram and things to look for, the atmosphere of the place, facial expressions and so on.

(p. 292) Q. All right. And Dr. Kirkham, have you ever found any suspects with weapons hidden in their boots?

A. I have, yeah. I have had occasion to, on frisks and searching people, to recover weapons from a variety of places.

Q. Would you consider that an unusual place to hide a gun?

A. No. A boot, ankle holster or boots are commonly used for, for weapons and, of course, we caution officers to, to that point.

Q. And you are aware that Officer Rotramel had a suspect, had a description of the armed robber, white male, brown hair and glasses?

A. Tinted glasses, yes.

Q. You're aware that Julian Rotramel was a white male with brown hair wearing tinted glasses?

A. I think you mean—

Q. Excuse me, I mean William Adam Tuttle, the decedent.

A. I'm aware that Mr. Tuttle approximately matched the description.

Q. You're aware that Mr. Tuttle approached Officer Rotramel?

A. I'm aware of that with a drink in his hand, yes.

Q. With a drink in his hand?

A. My understanding is that he had a drink when he walked across the bar.

Q. All right. He had a drink and put it down and approached Officer Rotramel with no drink in his hand?

(p. 293) A. Well, at some point and time the drink may have been, may have been put down, but the point sticks in my mind is that he initially had a drink in his hand as he approached or was called by the officer.

Q. All right. And Officer Rotramel told William Adam Tuttle to stay in the club, are you aware of that?

A. I'm aware of that, yes.

Q. You're aware that William Tuttle made two movements toward his feet inside the club while the officer was investigating the armed robbery report?

Mr. Gassaway: If the court please, I will object to the form of the question. That's Rotramel's version, not in effect what actually happened.

The Court: Overruled. He may answer.

A. I'm sorry. Would you please repeat that question?

Q. You're aware that William Adam Tuttle made two movements towards his feet while Officer Rotramel was trying to investigate the armed robbery?

A. Yes, I'm aware of that.

Q. You're aware that William Adam Tuttle darted out the door before Officer Rotramel told him he could leave?

A. It's not quite clear if he darted or ran, but he left the place abruptly, yes.

Q. And Officer Rotramel said he told him to stop at that moment?

A. Again, I, we seem to have some inconsistency in what people (p. 294) recall having occurred. I'm aware

that Officer Rotramel says that he hollered. I'm not clear just what he hollered, but he hollered something.

Q. All right. And then when he went outside the door, he told him to stop again, and William Adam Tuttle was down by his feet, reaching for something by his feet.

A. I'm aware that Officer Rotramel said Mr. Tuttle again made a reaching-type motion down toward his boot outside the establishment.

Q. And Officer Rotramel told him to stop at that point?

A. I can't recall what, if anything, Officer Rotramel said at that specific point. Again I have this recollection of him saying that he hollered, but that this, about this point and time, when the man's back was to him, he shot him at a very close range which looked to me about 8 or 10 feet.

Q. Are you aware that he shot after the decedent had jumped after he was told to stop?

A. He hadn't jumped but there was no evidence of a weapon with his back to the officer with a drawn weapon.

Q. You're saying that based on those facts that I've given you, that there's no remote possibility that Officer Rotramel could possibly believe that that fellow had a gun in his boot?

A. Same thing. I'm saying that there was—I'm not saying that. I'm saying that there's no remote justification for shooting (p. 295) under those circumstances. A man reaching for his, his boot—to give the officer the benefit of the doubt—he also could suppose, reasonably

suppose he's got something down there. Maybe he's got drugs he wants to get rid of or he's going for a weapon. Even assuming the latter, given the officer's position, given the things that he has seen and heard, there's just, you just don't kill someone over that.

Q. So, it's your testimony that Officer Rotramel had to wait to see a weapon before he could shoot?

A. In this circumstance I'm saying the officer should not have shot unless the man came up with—he saw the glint of a weapon, the handle of a weapon. I—you know, it would be a totally different situation, but he didn't see it. And in this kind of situation, as I say, all the direction of the officer's safety, there's no way—the officer could have shot easily if a person had come up with something, or attempted, because the man had his back to him, he would have had to get his pant leg up, get it out, it would become evident to the officer who could fire, had ample opportunity to fire with a drawn and steady weapon at that range, he would not aim—without any difficulty from there. The officer had the edge is what I'm saying.

Q. Did he have to wait until he saw the gun before, did he have to wait to see a weapon before he could shoot?

A. In this circumstance, yes, because there was no, there was (p. 296) no, no felony, no justification for shooting but the officer's fear of his own personal safety as a result of seeing a weapon.

Q. All right. Now, have you—are you aware of the size of Oklahoma City?

A. Well, I asked the fellow who picked me up last night. He told me there was about 700,000 people. I don't

know if that's accurate, but I know it's a large—comparable to Jacksonville where I work as an officer; it's a half a million people.

Q. Are you aware that of the physical size, the square mileage?

A. No, I'm not.

Q. Are you aware of the size of the police department?

A. No, I can only make an estimate based on the—it's a common formula—proportionate to the size of the community. We're talking about a large metropolitan department, I'm certain.

Q. But you don't know how many police officers are on the Oklahoma City police force?

A. No, nor, nor what their, "B" configuration was on the night in question nor how they were deployed.

Q. Or where they were stationed that night?

A. No. But I do know from reading the depositions that backup units were proximate and en route, at least one two-man unit, and I believe one, one-officer unit.

Q. And do you know where those units were in relation to the (p. 297) Will Do Club?

A. Close enough to make their arrival pretty quick. I don't know, I don't know specifically where they were. It would be meaningful to know since I'm not familiar with the layout of the streets.

Q. Okay. You went to the Will Do Club last night, is that correct?

A. That's correct.

Q. Are you familiar with that area? Do you know what type of area it is?

A. Oh, on the basis of my, my trip there last evening, yes.

Q. Do you know what the crime incidents is in that area?

A. It looked to be, it looked to me to be something sort of what criminologists call an interstitial area, I-N-T-E-R-S-T-I-T-I-A-L, which is a, which is a criminology term for an area characterized by not the most savory atmosphere in the world. It looked to be a, little bit of a, the bar itself looked to be not the most savory establishment.

Q. Do you know how many armed robbery calls are answered in Oklahoma City in bars per year?

A. No, I don't.

Q. Do you have any idea how many armed robbery calls in bars turn out to be accurate and false?

A. I'm aware that there are, as a police officer myself, I m (p. 298) aware that there's, a very large number of reported robbery calls are false.

Q. And specifically in bars, do you know how many are false calls in bars?

Mr. Gassaway: If it please the court, we let this go along for a while but I think we're getting beyond the scope of relevancy of this specific incident at this point.

The Court: Overruled. He can answer if he can.

A. I'm not aware of the, of the percentage in Oklahoma City of armed robbery calls in bars that are false, I couldn't concede to that.

Q. All right. And you spoke earlier of the difference between a felony and misdemeanor. Do you recall that testimony?

A. Yes.

Q. Do you know what the difference between a felony and a misdemeanor is in Oklahoma regarding robberies?

A. I have not, not seen the statute of the State of Oklahoma, so I couldn't concede to it.

Q. Would you be surprised to find out that the theft of anything over $20 is a felony?

A. Again, I'd have to see the statute. I'm not, I'm just not aware of what the, what the statutory definition of a felony is.

Q. Would you be surprised that $20 is the difference between the—

(p. 299) Mr. Gassaway: If the court, please, I'll object to that. That's not what the law is.

The Court: Sustained.

Mr. Mahoney: No more questions.

The Court: Redirect?

Mr. Gassaway: Thank you, Your Honor.

Redirect Examination

By Mr. Gassaway:

Q. Has any of that cross-examination changed your opinion that this shooting wasn't justified?

A. No.

Q. Now, something particularly causes me some concern during that cross-examination. They said for you to assume that Rotramel saw a man bent over, reach for a weapon, then said halt, and the man jumped, and he shot him, okay?

A. Yes.

Q. You are aware, are you not, that the bullet hole entered approximately right here (indicating) in the man's back?

A. And exited in the front.

Q. And exited 6.5 inches higher?

A. Yes.

Q. And you are aware that the officer drew down on the man from shoulder length?

A. Yes.

Q. Can you tell me how in the world you can get a trajectory of (p. 300) a bullet coming out 6 inches, 6.5 inches higher if the man had jumped?

Mr. Mahoney: Objection. I believe this is outside of the scope of what we've got here.

The Court: Overruled.

A. Now, again I don't purport to be a ballistics specialist, but as a police officer who has seen many, many shooting situations, I can't fathom how this shooting could have occurred the way it is purported to happen.

Q. And would it not be consistent—and the medical examiner in his interrogatories said that there was no deflection to cause it to go up, that the bullet hit a rib, but it didn't cause it to deflect—could there be any way that the man could have been shot except in his butt, if his rear end was higher than his head to get that trajectory to come out like it did?

Mr. Mahoney: Your Honor, he's already said he's not a ballistics expert.

The Court: Overruled.

A. Again, the same comment. As a police officer having seen shootings and reading of the facts in the case, I don't, I don't understand how that could have happened.

Q. So that man would have to be down, either bent over as Officer Rotramel thought he was, or having stumbled?

A. Yes, suffice it to say, he would have to be in, in (p. 301) non-menacing, because there's no way—I tried this, tried, my wife's assistance trying different positions trying to recreate what happened, and there's no way you can come out with any kind of threat to the officer, under these certain conditions, there is no way.

Q. And Officer Rotramel stated in his sworn deposition testimony that the shot, when he got hit with the bullet, did not knock him to the ground. Yet, the medical examiner's report indicates the man had abrasions of the knee and elbow. Would these abrasions take into consideration the fact that the shot did not knock him down be consistent with the man having stumbled and trying to get back up when he was shot?

A. I would think so.

Mr. Gassaway: That's all.

The Court: You may step down.

A. Thank you.